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IN THE
Supreme Court of the United States

SALVADOR MAGLUTA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Ft. Lauderdale, FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT
TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101-3045
(206) 622-3150

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does *Ashe v. Swenson*, 397 U.S. 436 (1970), allow the government to use a hypothetical factual explanation for a second trial verdict in order to avoid the collateral estoppel effect of a prior acquittal?

2. May a federal court sentence a defendant for conduct for which the government tried and failed to obtain a valid jury verdict?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Salvador Magluta respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's most recent opinion is unreported, App. 1a-16a, but can be found at 2008 WL 2303508. Its earlier decision, App. 17a-51a, is reported at 418 F.3d 1166. The relevant order of the District Court, App. 55a-59a, is unreported.

JURISDICTION

The Eleventh Circuit issued its decision on June 5, 2008. App. 1a. A timely petition for rehearing was denied on August 5, 2008. App. 60-61a. Justice Thomas extended the time for filing a petition for a writ of certiorari until December 3, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides, in relevant part, that "No person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial [] by an impartial jury of the State and district wherein the crime shall have been committed."

STATEMENT

In 1991, the government prosecuted Petitioner on two dozen drug-related counts. A jury acquitted him of all charges. Undeterred, the government brought a set of new charges against Petitioner—some of which required the government to prove as elements of the offenses the *same* conduct for which the first jury acquitted him. The district court, over Petitioner's double jeopardy and collateral estoppel objections, allowed the government to pursue these charges. The second jury again acquitted Petitioner on many, although not all, of the additional charges.

Unwilling to accept the first jury's across-the-board acquittal and the second jury's acquittal on many of the charges, the district court sentenced Petitioner as if he had been found guilty of all of these crimes. Had the district court sentenced Petitioner based on the *facts found beyond a reasonable doubt by the jury*, the high end of the sentencing range (for the crimes of laundering $730,000 and obstruction of justice) would have been under 20 years. Instead, relying on the government's unproven charges that Petitioner actually laundered $35 million and committed other violent crimes to boot, the district court imposed a 195-year sentence—approximately *ten times* the high end of the range authorized by the jury's verdict.

This case therefore presents in unusually stark relief two pressing questions regarding the ability of courts to punish defendants for conduct for which the government previously unsuccessfully prosecuted them.

1. In 1991, the government indicted Petitioner on twenty-four drug-related counts for operating a continuing criminal enterprise from January 1978 to April 1991 to import and distribute illegal narcotics. App. 19-20a. During a four-month trial in 1996, the government called dozens of cooperating witnesses and presented hundreds of documents. The government's case encompassed every drug offense that Petitioner had allegedly committed and every dollar he had allegedly earned therefrom.[1] Moreover, the government argued that money laundering activities were "part and parcel" of the drug charges. 1996 Trial Tr. at 9208, 11063-64. Ultimately, the district court granted judgments of acquittal on seven of the counts, and the jury acquitted Petitioner on all remaining counts. App. 19a.

2. In 1999, the government indicted Petitioner again. This time the government charged him with laundering drug proceeds, obstructing justice at the previous trial by bribing a witness and a juror, and related conspiracy counts. In order to convict Petitioner of money laundering, the government had to prove the following elements beyond a reasonable doubt: (1) Petitioner conducted, or attempted to conduct, a financial transaction (2) that involved the proceeds of a statutorily specified unlawful activity, (3) which he knew were proceeds from some form of illegal activity, and (4) that he engaged in the transaction knowing it was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds. App. 21a n.2 (listing elements

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[1] At the trial, Petitioner maintained in his defense that, while he had engaged in illegal drug activity in the past, he had ceased all such activity by 1980. App. 21a n.1.

of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i)). Both the conspiracy and substantive money laundering offenses charged that the funds involved in the alleged laundering were the proceeds of specified unlawful activity, i.e., the receiving, concealing, buying, selling, and otherwise dealing in a controlled substance.

Petitioner moved to dismiss the counts of the indictment charging money laundering and related conspiracy, arguing that his acquittal on all charges in 1996 established that he had not committed drug offenses during the time in which the specified unlawful activity in this case occurred. App. 20a, 56a. The magistrate judge recommended denying Petitioner's motion to dismiss. The district court adopted the magistrate judge's report and recommendation, stating that, even if the first jury determined that Petitioner did not commit drug offenses, the government could still proceed because, for the money laundering charge, the government simply "must prove that the proceeds used in the financial transactions were derived from narcotics trafficking and that [defendant] knew that this was the source of the funds." App. 57a. The government does "not need to prove that the defendants [sic] own drug trafficking activities produced the proceeds." *Ibid.*

3. Petitioner brought an interlocutory appeal of this order to the Eleventh Circuit. The government argued that establishing guilt on the money laundering charges would "not require [it to] prove that the funds were the proceeds of narcotics trafficking by *Appellant*[]." Gov't Br., No. 00-16505

(emphasis in original), *available at* 2001 WL 34149079, at *19. The Court of Appeals denied Petitioner's interlocutory appeal without prejudice, reasoning that his collateral estoppel claim was premature because "[a] finding that the defendant[] did not [himself] engage in cocaine trafficking offenses after any particular date would not preclude a finding that [he] laundered the proceeds of controlled substances, and conspired to do so, as charged in the present indictment." App. 53a. The court "impl[ied] no view" as to whether collateral estoppel would apply if the government ultimately argued at trial that Petitioner himself trafficked cocaine between 1980 and 1991. App. 53a-54a.

4. After remand, the case went to trial. The government not only used the same evidence to prove "unlawful activity" as it unsuccessfully offered in 1996, but its direct examination of the drug-related witnesses followed, nearly verbatim, the direction and proof it used in the earlier trial. Thereafter, in its closing argument, the government repeatedly argued that the funds at issue in the money laundering transactions came from Petitioner's *own* prior drug dealing—the same offenses for which he had previously been acquitted.

The jury found Petitioner guilty on eight of the thirty-one counts of money laundering (totaling $730,000 in payments to lawyers), one count of conspiracy to launder drug proceeds, one count of conspiracy to obstruct justice, one count of obstruction of justice by bribing a witness, and one count of obstruction of justice by bribing a juror. App. 17a-18a. In addition, the jury returned a special

forfeiture verdict under a preponderance of the evidence standard, finding that the amount involved in the money laundering conspiracy was $15 million. App. 18a. The jury acquitted Petitioner of the remaining counts, including a charge of witness tampering by way of violence. *See* Judgment, No. 99-583 (S.D. Fla. Jan. 23, 2003).

The district court sentenced Petitioner to 205 years in prison, which broke down as follows: twenty years imprisonment on each of the nine separate money laundering counts, which included conspiracy as one of the counts; five years imprisonment for conspiracy to obstruct justice; ten years for obstruction of justice by juror bribery; and ten years for obstruction of justice by bribing a witness. App. 18a.

Over Petitioner's Sixth Amendment objections, the court imposed the sentences consecutive to each other, relying on two alternative grounds. First, despite Petitioner's assertion that "'[t]he notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence,'" Sentencing Hearing 1/22/03 Tr. 795 (quoting *United States* v. *Watts*, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting)), the court found that Petitioner had laundered $35 million in drug proceeds. In so doing, the court ignored the jury's verdict finding Petitioner guilty of money laundering counts totaling only $730,000, as well as its finding—under a preponderance of the evidence standard—that the overall laundering conspiracy involved $15 million. Second, the Court reasoned that the "egregious

nature" of the bribery offenses warranted an upward departure. App. 46a-47a.

5. On appeal, the Eleventh Circuit affirmed in part and reversed in part. The Eleventh Circuit reversed Petitioner's conviction for obstruction of justice through jury bribery because it rested on improperly admitted hearsay evidence. App. 37a-38a. It affirmed all of Petitioner's remaining convictions, including those for money laundering. App. 51a. The Eleventh Circuit acknowledged that the government had used evidence of criminal activity for which Petitioner had been acquitted "in order to establish in this case the 'specified unlawful activity' element of the money laundering charges." App. 20a. But the court rejected Petitioner's collateral estoppel argument, reasoning that, since the money laundering statute does not require that a defendant launder the proceeds of his *own* criminal activity—just that he knows that he is laundering the proceeds of *some* felony drug offenses—the government hypothetically could have secured a conviction under that statute without relying on previously-acquitted conduct by showing that Petitioner had laundered *someone else's* drug proceeds. App. 23a-24a.

The Eleventh Circuit also rejected Petitioner's sentencing arguments. It concluded that it "need not decide if the district court erred in calculating [Petitioner's] offense level using an amount greater than the $15 million figure that the jury found in the special forfeiture verdict" because the district court's alternative upward departure was valid. App. 45a. The district court based that upward departure in part on Petitioner's now-invalid conviction for

bribing a juror, but the Eleventh Circuit held that its reversal of that conviction "does not undermine the factual premise of the district court's preemptive departure decision." App. 47a n.8. "[I]t is well-established that, in sentencing, a district court can consider [evidence] even if it was not admissible in determining guilt, so long as there are sufficient indicia of reliability." *Ibid.* The court vacated Petitioner's sentence and remanded the case to the district court with directions either to reimpose his sentence "with a reduction of 120 months as a result of there being no conviction for [bribing a juror]," or to resentence on all counts. App. 51a.

6. Petitioner filed a petition for a writ of certiorari, which this Court denied (548 U.S. 903 (2006)) after the government argued that the interlocutory posture of the case was reason alone to deny the petition. Gov't Br. in Opp., *available at* 2006 WL 1463612, at *13. The government also asserted that the denial of certiorari would "not preclude petitioner from raising the same issues in a later petition, after the entry of final judgment." *Ibid.*

7. On remand to the district court, the government did not recharge Petitioner with obstruction of justice through juror bribery. The government instead recommended that the district court reduce Petitioner's sentence by 120 months instead of resentencing him across the board. The district court, after hearing argument from Petitioner regarding the unreasonableness of even a reduced sentence and the reliance on acquitted and unproven conduct to calculate that sentence, agreed with the government

and sentenced Petitioner to 195 years in prison. App. 5a.

8. Petitioner appealed to the Eleventh Circuit, arguing, *inter alia*, that the 195-year sentence was procedurally and substantively unreasonable and that the district court's reliance on conduct that the government tried and failed to prove to the jury to impose Petitioner's sentence violated the Fifth and Sixth Amendments. The Eleventh Circuit affirmed. App. 16a.

9. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

1. The doctrine of collateral estoppel, which "stands for an extremely important principle in our adversary system of justice," *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), is grounded in the realities of a trial. Simply put, if a jury previously found that someone did not commit an unlawful act, the government may not relitigate that issue in a later trial. That the government hypothetically might be able to prove its new charges without contradicting the prior jury verdict is of no moment if the government offers no evidence to support such a hypothetical factual theory.

The Court of Appeals here rejected Petitioner's collateral estoppel argument on a factual theory that had *no* support in the record. In so doing, the Eleventh Circuit not only broke from this Court's well-established case law, but it also exposed a fissure in how the Courts of Appeals and highest

state courts apply criminal collateral estoppel. The majority of courts recognize that resolving collateral estoppel disputes requires an analysis grounded in the evidence and arguments actually in the record. A smaller group, however, allows a later prosecution to proceed simply on theoretical proof, irrespective of the underlying evidence. This Court should grant review of the Eleventh Circuit's judgment in order to rectify this troubling development.

2. The Eleventh Circuit also improperly condoned the use of unproven conduct with respect to Petitioner's sentence. Some courts and judges have recognized that this Court's robust conception of the Sixth Amendment in *United States v. Booker*, 543 U.S. 220 (2005), means that defendants' sentences may no longer be based on such conduct. But the Eleventh Circuit and other courts have adopted the opposite view, maintaining that this Court's per curiam decision in *United States v. Watts*, 519 U.S. 148 (1997), allows sentencing courts to continue considering acquitted conduct. This Court should resolve the confusion and hold that the Sixth Amendment and the Due Process Clause do not tolerate such end runs around the primacy of juries in criminal cases, even under the current federal "advisory guidelines" sentencing regime.

I. This Court Should Grant Review To Resolve Disagreement Over The Scope Of The Criminal Collateral Estoppel Doctrine.

A. The Eleventh Circuit's Decision Contravenes This Court's Precedent.

1. From its inception, this Court has grounded criminal collateral estoppel in the actual facts of the case before it.

Basic principles of constitutional and federal law proscribe subjecting criminal defendants to the repeated crucible of a trial to determine the fate of their liberty when a jury has already found them not guilty of certain conduct. "[T]he law attaches particular significance to an acquittal," so that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'" *United States v. Scott*, 437 U.S. 82, 91 (1978) (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)).

1. The rise of collateral estoppel in the criminal realm resulted from the changing nature of prosecutions themselves. With the "extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. As a result, "the potential for unfair and abusive reprosecutions became far more pronounced," and "federal courts soon recognized the

need to prevent such abuses through the doctrine of collateral estoppel." *Ibid.*

In *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), this Court rejected the argument that res judicata,[2] while an accepted part of civil litigation, did not apply to criminal defendants except in the modified form of Fifth Amendment Double Jeopardy. Speaking for the Court, Justice Holmes wrote that the Fifth Amendment "was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time." *Id.* at 88 (citation omitted). After *Oppenheimer*, this Court continued to apply res judicata and collateral estoppel to criminal proceedings, noting that the analysis "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579 (1948).

2. In *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), this Court confirmed that the doctrine of collateral estoppel was grounded in the Double Jeopardy Clause of the Constitution and "has been an established rule of federal criminal law at least since" *Oppenheimer*. Unlike classic double jeopardy doctrine, collateral estoppel "operates to conclude those matters in issue which the verdict determined[,] though the offenses be different."

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[2] "While the concepts of res judicata and collateral estoppel are distinct, within the context of double jeopardy they have been used by the Supreme Court interchangeably." 4 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 29:41 (3d ed. 1996).

Sealfon, 332 U.S. at 578. Collateral estoppel simply "means . . . that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

Ashe established a two-step process for assessing collateral estoppel challenges on appeal. First, one must ascertain the basis for defendant's acquittal at the initial trial. *Id.* at 444. Then, a court must determine whether, in the second trial, the government can prove the elements of its case without relying on the conduct for which the first jury acquitted defendant. *See ibid.* Unless "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," the government's second prosecution is estopped. *Ibid.* (quotations omitted).

2. Contrary to this Court's teachings, the Eleventh Circuit failed to apply collateral estoppel based on the case's actual record.

The Eleventh Circuit's decision squarely contradicts this Court's teachings in *Ashe*, its progeny, and its common law predecessors[3] that courts must eschew theoretical application of collateral estoppel doctrine. By ignoring the actual

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[3] Because Petitioner is not asking this Court to review the judgment of a state court, there is no need in this case to delineate exactly whether common law collateral estoppel principles are broader than those grounded in the Double Jeopardy Clause.

record of the case before it, the Eleventh Circuit ignored *Ashe*'s instruction to apply collateral estoppel "with realism and rationality," and not in a "hypertechnical" way. *Ashe*, 397 U.S. at 444. Its "technically restrictive" view of collateral estoppel "would . . . amount to a rejection of the rule of collateral estoppel in criminal proceedings," and cannot stand. *Ibid.*

The record of this case starkly reveals that the government relied upon the drug offenses for which Petitioner had been acquitted to prove beyond a reasonable doubt that the financial transactions in its money laundering charges involved "the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). The Eleventh Circuit assumed that the first jury determined that Petitioner did not import or distribute narcotics, but, to avoid the collateral estoppel effect of the earlier jury's acquittal, it speculated that Petitioner *could have* laundered the proceeds of someone else's unlawful activity. App. 23a-24a.

Ashe does not allow this result. *Ashe* and its progeny specifically reject hypertechnical applications of collateral estoppel doctrine that would render this "extremely important principle," 397 U.S. at 443, completely illusory. *See also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (per curiam) (where defendant had been acquitted of murder in course of robbery, he could not then be tried for robbery); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (where defendant had been acquitted of murdering bomb victim, he could not then be tried for murder and assault of other victims

of same blast); *Simpson v. Florida*, 403 U.S. 384, 386-87 (1971) (per curiam) (where defendant had been acquitted of armed robbery of store manager, he could not then be tried for armed robbery of store customer)

"If the prosecution wants to continue to pursue a defendant who has won an acquittal, collateral estoppel requires that the prosecution find a *new basis* on which to proceed. The prosecution should not be able to avoid that prohibition by fitting the rejected theory and evidence to new charges." Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1, 21 (1989) (emphasis added); *see also United States v. Dixon*, 509 U.S. 688, 705 (1993) ("The collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts.") (citation omitted) (emphasis removed). Yet that is exactly what the government did here; even a cursory review of the records of the two proceedings gives one a sense of "déjà vu all over again."[4]

While it is true that the government here did not need to prove that Petitioner himself committed specified unlawful acts to generate the money that was laundered, it did have to prove—beyond a reasonable doubt—that the proceeds came from someone's unlawful activity. But the *only* evidence the government presented in this respect involved alleged acts by Petitioner, the very acts the prior jury

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[4] Yogi Berra, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 754 (16th ed. 1992).

found he did not commit. The fundamental teaching of *Ashe*, however, is that when one jury determines "that the defendant was not one of the criminals involved in the alleged crime, a second prosecution for crimes arising out of the same event is wholly impermissible." ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:26 (4th ed. 2003). *See also Lewis v. United States*, 518 U.S. 322, 336 (1996) ("government may be barred by collateral estoppel if a fact is found in favor of the defendant and is dispostive in later trials") (Kennedy, J., concurring).[5]

Applying the Eleventh Circuit's view of collateral estoppel to prior decisions of this Court demonstrates

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[5] *Dowling v. United States*, 493 U.S. 342 (1990), is not to the contrary. There, this Court held that a prior acquittal does not preclude the government from relitigating a question of fact if that issue is governed by a lower standard of proof in a subsequent proceeding. *Id.* at 347-50. *Dowling* does not control the situation where, as here and in *Ashe*, "the prior acquittal determined facts [that] were a necessary element for the second offense." *Dowling*, 493 U.S. at 357 n.1 (Brennan, J., dissenting). *See also United States v. Bailin*, 977 F.2d 270, 280 (7th Cir. 1992) ("*Dowling* thus establishes that issue preclusion in criminal cases only applies when the relevant issue is 'ultimate' in the subsequent prosecution, i.e., when the issue must be proven beyond a reasonable doubt."); *United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992) ("*Dowling* did not alter *Ashe* so much as it introduced a new perspective on the meaning of 'ultimate fact' decided in the first trial."); *United States v. Mespoulede*, 597 F.2d 329, 334 (2d Cir. 1979) (describing the "*Ashe v. Swenson* paradigm [as when] the fact sought to be relitigated is essential to conviction and thus must be proved beyond a reasonable doubt"). Here, the acquitted conduct was the sole evidence the government introduced to prove an essential element of the money laundering charge—the specified unlawful activity—that the government had to prove beyond a reasonable doubt.

how extreme that view is. For example, in *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), the Court held that collateral estoppel precluded defendant's indictment for robbery because an earlier jury had acquitted him of murder in the course of committing a robbery. The state stipulated that the evidence it "would present on the robbery charge would be identical with that it introduced on the murder charge." *Id.* at 368. Examining the record of the first trial, the Court held that the jury's verdict "necessarily mean[t] that it found petitioner not guilty of . . . killing" in the course of robbery. *Id.* at 369. This Court explicitly rejected as irreconcilable with the record of the first trial the state's attempt to characterize the jury's verdict as not necessarily deciding whether defendant robbed the victim. *Ibid.*

Viewing the facts of *Turner* through the Eleventh Circuit's collateral estoppel lens would have yielded a much different result. Even if the Court of Appeals assumed that the first jury in the murder trial necessarily decided that the defendant had not robbed his victim, it would have still allowed the government to proceed on the robbery charge based on the hypothetical possibility that the government could have obtained a valid robbery conviction by proving that the defendant had robbed someone other than the murder victim that night. Never mind that there was no evidence in the record to support such a theory; the Eleventh Circuit's rule deals solely in possibilities, not realities.

B. The Eleventh Circuit's Decision Conflicts With The Rule In Other Federal Courts Of Appeals And State Courts.

The Eleventh Circuit's hypertechnical application of collateral estoppel—which unmoored the doctrine from the actual facts of the case at issue—intensifies a conflict in the federal Courts of Appeals and state courts of last resort. Following *Ashe*, lower courts have consistently recognized that, at the first step of the analysis, they must look to the actual facts and trial theory in the prior trial to determine the basis for the jury's acquittal.[6] But when it comes to the second step of assessing whether the government, *in a subsequent trial*, may present factual theories inconsistent with that prior acquittal, courts diverge. One group of courts recognizes that collateral estoppel requires them to look to the government's

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[6] *E.g.*, *United States v. Carbullido*, 307 F.3d 957, 963 (9th Cir. 2002) (*Ashe* "precludes limiting the determination of a jury to the minimum necessary to return a verdict of not guilty under the precise terms of an indictment; consideration of the evidence is necessary") (quotations omitted); *United States v. Leach*, 632 F.2d 1337, 1340 (5th Cir. 1980) (rejecting government's theory as to how first jury decided issue in case because while it was "of course, plausible in theory, . . . the most obvious difficulty with this is that the government did not try its case on that theory") (quotation marks and alteration removed); *United States v. Day*, 591 F.2d 861, 869 n.19 (D.C. Cir. 1978) ("Conceivably, there may have been some circumstance in the first trial that led that jury to conclude that all of the requirements for guilt had not been demonstrated beyond a reasonable doubt. . . . Yet we are convinced on the record presented here that the requirements for invocation of the collateral estoppel doctrine are met."). In other words, there is a symmetry to the application of collateral estoppel in that the actual record of both the first *and* the second proceeding governs the collateral estoppel analysis.

actual allegations in the new case and will not allow the government to avoid collateral estoppel based merely on hypothetical theories they are not advancing. However, the Eleventh Circuit and the Supreme Court of Wyoming have strayed from *Ashe* and allow the government to proceed based on wholly hypothetical theories, irrespective of its actual evidence and allegations.

1. Thirteen courts—including five federal Courts of Appeals and five state high courts—hold that the government may not use alleged conduct to prove a crime if a jury in a prior trial found that the defendant did not engage in it. The facts of *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979), for example, are on all fours with this case, but there the Fifth Circuit reached the opposite result. Mock had been acquitted on charges of conspiracy to import, possess, and distribute marijuana. *Id.* at 342. Later, the government charged Mock with tax evasion and "urged . . . that [Mock] received income from the very conspiracy operation of which he had been acquitted in the first trial. In addition, the government elicited essentially identical testimony from [the same witness] to prove that [Mock] received income from the marijuana conspiracy." *Id.* at 344.

The Fifth Circuit rejected the government's attempt to avoid the collateral estoppel effect of the first acquittal by introducing in the subsequent proceeding a theory unsupported by the actual facts of the case:

> *Theoretically*, it is true that appellant *might* be found not guilty of the conspiracy charge and yet have committed the substantive

> crimes of importation and distribution of marijuana; and therefore it might also be *theoretically* true that even though the first trial established as a fact that appellant was not a member of the . . . conspiracy, *appellant might nevertheless have derived taxable income from the distribution or sale of marijuana in 1972 (from sources other than the [alleged conspiracy]).* . . . If the government *had* presented evidence that appellant had derived income from the sale of marijuana on facts *other than* those showing that he derived income *from this particular conspiracy*, then such evidence would be neither inconsistent with the prior verdict of acquittal nor barred by collateral estoppel. However, the *facts of this case* do not conform to these hypotheticals: The government based its case upon the very theory that appellant derived income from the conspiracy of which he already had been acquitted.

Id. at 344-45 (emphasis added). The court found it irrelevant that the "appellant's acquittal on the conspiracy charge d[id] not negate the *possibility* that he may otherwise have derived income from the sale or distribution of marijuana." *Id.* at 345 (emphasis added). As far as the Fifth Circuit was concerned, "[f]or purposes of any subsequent prosecution of [Mock], [his] acquittal has conclusively established that [he] did not participate in a

marijuana conspiracy . . . during the time frame of the first indictment." *Ibid.*[7]

The Ninth Circuit is in accord. In *United States v. Stoddard*, 111 F.3d 1450 (9th Cir. 1997), the court held that defendant's acquittal of conspiracy to distribute marijuana—where the jury necessarily decided that the $74,000 used to purchase drugs did not belong to defendant—barred the government's later indictment of defendant for submitting false income tax returns *if* that charge depended on the defendant's ownership of the $74,000 allegedly not reported to the IRS. *Id.* at 1458-59. The court, however, allowed that *if* the false income tax return charge could "be supported by evidence *other than* [defendant's] alleged ownership of the $74,000,

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[7] In *Green v. Estelle*, 601 F.2d 877 (5th Cir. 1979), the Fifth Circuit also refused to allow the government to avoid collateral estoppel based on a hypothetical argument not advanced in the second trial. There, the state charged the defendant in two separate indictments of murdering two people with malice. *Id.* at 877. On trial for the murder of one of the victims, the jury found defendant guilty of murder *without* malice. *Ibid.* Subsequently, the state went forward on the murder with malice charge for the second victim. *Ibid.* The defendant argued, and the Court of Appeals agreed, that because the jury in the first murder trial "must have determined the malice issue in [defendant's] favor," *id.* at 878, collateral estoppel precluded relitigating the issue of his malice in the second trial, *id.* at 879. The Fifth Circuit rejected the state's attempt to avoid collateral estoppel by raising a hypothetical not supported by evidence in the record—namely, the state argued that, because the defendant's state of mind "might have changed between the two killings," it was not religitating the issue of malice in the murder of the second victim. *Ibid.* The Fifth Circuit rejected this hypothetical because "[t]here [wa]s absolutely no evidence indicating a change in [defendant's] intent." *Ibid.*

collateral estoppel would not bar" his prosecution on that count. *Id.* at 1459-60 (emphasis added).[8] Thus, like the Fifth Circuit, the Ninth Circuit also requires that the government's theory of the case find support in the *actual* record before it declines to apply collateral estoppel.[9]

Other federal courts have adopted the same rule. *See United States v. Calderone*, 982 F.2d 42, 48 (2d Cir. 1992) (where defendant had been acquitted of conspiracy to commit various drug crimes, collateral estoppel precluded government from relying on conspiracy as evidence of a drug offense in later charge of using telephone to facilitate narcotics offenses; prosecution could proceed if government had evidence of *other* drug offenses); *Pugliese v. Perrin*, 731 F.2d 85, 89-90 (1st Cir. 1984) (rejecting government's attempt to "plug[]" an "evidentiary gap" in its negligent homicide prosecution with conduct forming the basis of defendant's previous acquittal for manslaughter; prosecution could proceed only on *other* evidence of negligence); *Feela*

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[8] *Accord United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (where defendant was acquitted of three counts of bank robbery, collateral estoppel would not bar charge of conspiracy to commit bank robbery "*if* [the government] were to proffer proof of overt acts contained in the indictment that are *independent of the three acquitted bank robbery counts*") (emphasis added).

[9] For a recent case in the Ninth Circuit applying this rule, see *Melonzi v. Hubbard*, 2008 WL 3539479, at *4-*6 (N.D. Cal. 2008) (in trial for continuous sexual abuse, government could not introduce evidence of rape for which defendant had been acquitted as one of the three acts necessary to show continual abuse; prosecution could proceed only on *other* evidence of abuse).

v. Israel, 727 F.2d 151, 155 (7th Cir. 1984) (acquittal of car theft should have collaterally estopped state from introducing evidence of theft as one of defendant's possible acts to effect the object of a conspiracy at later trial for conspiracy to commit armed robbery; conviction relying on that ground would be unconstitutional despite existence of other possible overt acts); *see also United States v. Crispino*, 586 F. Supp. 1525, 1534 (D.N.J. 1984) (in trial for tax evasion, government could not introduce evidence of drug trafficking enterprise for which defendant had been acquitted as source of income).

Five state high courts likewise apply *Ashe* with realism and an eye to the facts actually at issue in the second proceeding. In *State v. Henning*, 681 N.W.2d 871 (Wis. 2004), the Wisconsin Supreme Court held that collateral estoppel precluded the state from prosecuting defendant for bail jumping based on a theory that he violated the conditions of his bond—a necessary element of bail jumping—by possessing controlled substances with intent to deliver because he had already been acquitted of those charges. *Id.* at 879. While the state could proceed based on some *other* alleged violation of his bond conditions, using the theory that he possessed drugs with intent to deliver would constitute an impermissible retrial on that issue. *Id.* at 886.

Other state courts of last resort have invoked similar reasoning. *See State v. Aparo*, 614 A.2d 401, 414 (Conn. 1992) (acquittal on accessory to murder charge in which "jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy," collaterally estopped retrial

on conspiracy to commit murder); *State v. Miller*, 471 So. 2d 603, 607-08 (La. 1990) (acquittal of attempted aggravated rape collaterally estopped prosecution for kidnapping arising from same crime where "the record [of second trial] strongly suggests that the state was relying on the existence of an attempted aggravated rape as the sole basis for satisfying the 'unlawful purpose' element" of the kidnapping charge); *Simon v. Commonwealth*, 258 S.E.2d 567, 572 (Va. 1979) (acquittal on driving under influence of intoxicants collaterally estopped government in later involuntary manslaughter prosecution from arguing defendant was intoxicated; state could proceed only with "other acts of criminal negligence"); *Commonwealth v. Grazier*, 393 A.2d 335, 337 (Pa. 1978) (acquittal of mail fraud in connection with alleged arson scheme collaterally estopped later prosecution for arson where first jury had necessarily determined that defendant did not commit arson and the *only* evidence the prosecutor had to establish "that fact" was "substantially the same as that presented at the [first] trial"); *see also State v. Wade*, 2008 WL 366143, at *5-*7 (Ohio Ct. App. 2008), *on reconsideration*, 2008 WL 1723671, *rev. denied*, 891 N.E.2d 769 (Ohio 2008), *petition for cert. filed*, 77 U.S.L.W. 3281 (U.S. Oct. 30, 2008) (No. 08-585) (reversing conviction because court failed to give limiting instruction precluding jury from relying on previously acquitted conduct in order to find element of new charges satisfied).[10]

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[10] Ohio has filed a petition for certiorari in *Wade*, arguing that collateral estoppel does not bar the admission of evidence, even when that evidence is conduct for which the defendant has been acquitted and proves an element of charge in the second trial.

2. By permitting the government to prove a crime using allegations a jury previously rejected, so long as it *hypothetically* could prove the charge with different evidence, App. 23a-24a, the Eleventh Circuit stands in direct conflict with these authorities.

So does the Wyoming Supreme Court. In *Eatherton v. State*, 810 P.2d 93, 100 (Wyo. 1991), the court held that the defendant's prior acquittal on a larceny charge did not prevent the government from relying on that alleged conduct to prove an element in defendant's later trial for burglary. To prove burglary, the government had to show that the defendant made an "unlawful entry . . . with an intent to commit larceny *or* a felony in the premises." *Id.* at 99 (emphasis added). As the dissent pointed out, however, "[w]ithout proof that [defendant] stole [the victim's] wallet and money"—conduct for which he had already been acquitted in the larceny trial—"there was no proof of an 'intent to commit larceny'" necessary to sustain the burglary conviction. *Id.* at 104 (Urbigkit, C.J., dissenting). Nor was there any suggestion in the majority or dissenting opinion that the state presented evidence that defendant actually had an intent to commit any other felony when he entered the premises. "In other words, the ultimate fact in the first proceeding *was* determinative in the second proceeding" and should have been barred by collateral estoppel. *Ibid.* (emphasis added).

Ohio Cert Pet., *available at* 2008 WL 4792488, at *13-*18. If this Court grants review in that case, it should hold this Petition and dispose of it in accordance with the ultimate result in *Wade*.

There is no way to reconcile these two groups of decisions. This Court is the only institution that can bring order to this important area of criminal procedure. It should do so before more defendants have to face successive prosecutions for alleged actions that juries already have determined the government could not prove.

II. This Court Should Grant Review To Address The Permissibility Of Sentencing Someone Based On Alleged Conduct For Which The Government Tried And Failed To Obtain A Valid Jury Verdict.

Review also is warranted here because this case vividly highlights the need for this Court to decide whether sentencing a defendant based on acquitted conduct violates (1) the Fifth and Sixth Amendments in general; (2) the Fifth and Sixth Amendments at least when the sentence would be substantively unreasonable but for the truth of the acquitted conduct; or (3) the requirement in *United States v. Booker*, 543 U.S. 220 (2005), that sentences be "reasonable."

1. Ever since this Court held in *Booker* that the federal sentencing guidelines needed to be "advisory" in order to comport with the Sixth Amendment, *id.* at 233, one remaining constitutional issue has stood out: May federal courts continue to base increases of defendants' sentences on acquitted conduct? Although such sentencing is—as one federal appeals judge has remarked—"reminiscent of *Alice in Wonderland*, . . . [a]cquittal first, sentence afterwards," *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (quotations

omitted), this Court condoned it in *United States v. Watts*, 519 U.S 148 (1997) (per curiam). Yet *Booker* characterized *Watts* as a "very narrow" case dealing only with double jeopardy considerations, not the Sixth Amendment or Due Process Clause. 543 U.S. at 240 & n.4.

It is not surprising, therefore, that in the wake of *Booker*, lower courts have divided and expressed great consternation over whether the practice condoned in *Watts* is still legitimate. At least three district courts have held that *Watts* does not survive *Booker*'s construction of the Sixth Amendment. *United States v. Coleman*, 370 F. Supp. 2d 661, 669-73 (S.D. Ohio 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 150-53 (D. Mass. 2005); *United States v. Carvajal*, 2005 WL 476125, at *4 (S.D.N.Y. 2005). The District of Massachusetts explained that:

> *Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, *Blakely v. Washington*, [542 U.S. 296, 305] (2004), and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.
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> . . . Sentencing today—even post-*Booker*—is still profoundly influenced by the rules, namely the Guidelines. That is what the remedy opinion admonishes; that is what the post-*Booker* case law suggests. It is, in

> effect, a hybrid regime—neither purely discretionary nor mandatory Guidelines. And that fact has certain consequences in terms of the significance of acquitted conduct, and more generally, the procedural protections at sentencing.
>
> To consider acquitted conduct trivializes "legal guilt" or "legal innocence"—which is what a jury decides—in a way that is inconsistent with the tenor of the recent case law. . . . [W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.

Pimental, 367 F. Supp. 2d at 150-52 (footnote omitted; emphasis removed). Furthermore, even if *Booker* does not totally preclude sentencing courts from considering alleged conduct the jury refused to find, such conduct must at least be proved—contrary to the alleged conduct here—beyond a reasonable doubt. *Id.* at 153-54; *accord United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005).

A number of judges on the federal Courts of Appeals have similarly recognized that using unproven conduct to increase a defendant's sentence violates the Sixth Amendment:

> When a jury refused to convict defendants of several counts, but the trial court nonetheless relies on that same acquitted conduct to increase the defendants' sentences . . ., the jury has not authorized

> the resulting sentence in any meaningful sense. Reliance on acquitted conduct in sentencing dramatically undermines the protections enshrined in the Sixth Amendment.

United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting); *accord United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("clear implication" of *Apprendi*, *Blakely*, and *Booker* is that a "judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence"); *United States v. Thompson*, 515 F.3d 556, 570 (6th Cir. 2008) (Merritt, J., dissenting) ("ratcheting-up" sentences "based upon judicial findings of fact . . . is completely inconsistent with the *Blakely* and *Booker* opinions"); *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (en banc) (Ambro, J., concurring in judgment) (allowing "sentencing judges, once a jury has found . . . that a defendant has committed *one* crime, then to find him guilty by a preponderance of evidence of *other* crimes for which he was *not* tried – or worse, tried and acquitted – and to sentence him as if he had been convicted of *them* as well" amounts to "a shadow criminal code under which . . . a defendant receives few of the trial protections mandated by the Constitution") (emphasis in original); *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring) ("the most pernicious effect of sentencing on the basis of acquitted conduct . . . is its implicit and often hopeless demand that, in order

to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once").

Members of this Court have also recognized that the use of acquitted conduct in sentencing defendants raises constitutional issues. *Watts*, 519 U.S. at 169-70 (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence."); *id.* at 170 (Kennedy, J., dissenting) ("to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal").[11]

This case exemplifies why such an approach violates the rights to jury trial and due process. Here, the *high* end of Petitioner's sentencing range authorized by *facts found by the jury* beyond a reasonable doubt was 235 months, or under 20

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[11] Numerous commentators agree that this Court's Sixth Amendment jurisprudence precludes judges from relying on acquitted conduct when sentencing a defendant. *E.g.*, Steven G. Kalar & Jon M. Sands, *An Object All Sublime—Let the Punishment Fit the Crime*, 32 CHAMPION 20, 28-29 (March 2008); James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-*Booker *Dustbin*, 49 WM. & MARY L. REV. 289, 292 (2007); Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L. J. 1537, 1557 (2006); Richard E. Myers II, *Restoring the Peers in the "Bulwark":* Blakely v. Washington *and the Court's Jury Project*, 83 N.C. L. REV. 1383, 1406-10 (2005).

years.[12] The district court, however, imposed a 195-year sentence based on alleged conduct, all of which the government failed–to prove to the jury.[13] Thus, Petitioner's 195-year sentence is almost *ten times* the sentence he would have received if the district court had not relied on unproven conduct. In other words, the jury's verdicts of acquittal did not matter; instead, the district court substituted its judgment that "justice require[d] that [Petitioner] be given the sentence [he] would have been given if [he] had been found guilty" in the 1996 trial for drug trafficking. Status Conf. 10/6/06 Tr. 37-38; *see also* Sentencing Hearing 11/29/06 Tr. 17, 60-61.

The Eleventh Circuit allowed Petitioner's sentence to stand, App. 1a n.1, 46a-48a, consistent with its prior holding that "nothing in *Booker* erodes" its past precedent allowing "[r]elevant conduct of which a defendant was acquitted [to] be taken into account in sentencing for the offense of conviction." *United*

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[12] The offense level based on facts found by the jury would have been no more than 32. The resulting Guidelines range for that level is 188-235 months.

[13] The district court relied on the following unproven facts to sentence Petitioner: (i) the alleged drug offenses for which a jury acquitted Petitioner in 1996; (ii) Petitioner laundered over $35 million, even though the jury found beyond a reasonable doubt that he was guilty of substantive money laundering crimes involving only $730,000, and that, even using the same preponderance of the evidence standard the judge used, the entire laundering conspiracy involved only $15 million; and (iii) the allegation that Petitioner bribed a juror in his previous trial, even though the Eleventh Circuit held that the government used inadmissible evidence to secure that conviction and thus reversed it. App. 46a-47a; Status Conf. 10/6/06 Tr. 37-38; Sentencing Hearing 11/29/06 Tr. 17, 60-61.

States v. Duncan, 400 F.3d 1297, 1304-05 (11th Cir. 2005) (quotations omitted). The Eleventh Circuit's decision is consistent with other Courts of Appeals that have issued similar rulings, reasoning generally that courts may continue to consider acquitted conduct because *Booker* did not overrule *Watts* and/or that "consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes." *United States v. Dorcely*, 454 F.3d 366, 371-73 (D.C. Cir. 2006). *Accord United States v. Mercado*, 474 F.3d 654, 656-57 (9th Cir. 2007); *United States v. Brika*, 487 F.3d 450, 459 (6th Cir. 2007); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Magallenez*, 408 F.3d 672, 683-85 (10th Cir. 2005).

The time has come for this Court to resolve this question. Until it does, the integrity and public perception of the criminal justice system will continue to suffer, as the lower courts avoid the issue by relying on *Watts*, apparently afraid to go where this Court has not yet explicitly gone. This Court should bring an end to this unseemliness and uncertainty and hold that sentencing a defendant to the same sentence he would have received had he been convicted of the counts on which the jury acquitted eviscerates the Sixth Amendment right to a jury and the Due Process Clause.

2. Even if basing a defendant's sentence on acquitted conduct does not always violate the Constitution, doing so must violate the Sixth Amendment when that conduct is necessary for the sentence to be substantively reasonable. This Court "has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall v. United States*, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring); *see also Rita v. United States*, 127 S. Ct. 2456, 2478 (2007) (Scalia, J., concurring in part and concurring in judgment) ("there will inevitably be *some* constitutional violations . . . because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts") (emphasis in original); *Marlowe v. United States*, 2008 WL 4550707, at *1 (U.S. Oct. 14, 2008) (Scalia, J., dissenting from denial of certiorari) (appellate court's holding that a life sentence was constitutional "solely because of [a] judge-found fact," "falls short of what we have held the right to trial by jury demands").

Here, the Court of Appeals upheld Petitioner's 195-year sentence as reasonable because "his crimes were serious and involved a wholesale corruption of our system of justice" and "his criminal activity began in the 1970s," thus ignoring the jury's acquittal in 1996 of such allegations. App. 11a; *see also* App. 46a. As explained above, however, the high end of Petitioner's sentencing range authorized by facts

found by the jury was just under 20 years. Absent additional judge-found facts, Petitioner's 195-year sentence—approximately ten times the high end of the range authorized by the jury's verdict—would be patently unreasonable. The Eleventh Circuit's reliance on judge-found facts to uphold the sentence should not stand.

3. Finally, Petitioner's sentence violates the remedial portion of *Booker* that requires sentences to be reasonable "with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. That statute instructs the district court to consider "the nature and circumstances *of the offense*," 18 U.S.C. § 3553(a)(1) (emphasis added), the need for the sentence "to reflect the seriousness *of the offense*, to promote respect for the law, and to provide just punishment *for the offense*," *id.* § 3553(a)(2)(A) (emphasis added), and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been *found guilty of similar conduct*," *id.* § 3553(a)(6) (emphasis added). The "offense" is the offense *of conviction.* Under the statute, therefore, it is unreasonable for to a court to base its sentence excessively on acquitted or otherwise unproven conduct.

This Court should grant review to hold that reliance on unproven conduct to impose a 195-year sentence renders the sentence substantively unreasonable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Ft. Lauderdale, FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT
TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101-3045
(206) 622-3150

December 3, 2008

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Salvador MAGLUTA, a.k.a. Sal,
Defendant-Appellant.
No. 06-16473
Non-Argument Calendar.

June 5, 2008.

Bruce Rogow, Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Defendant-Appellant.

Madeleine R. Shirley, Anne R. Schultz, U.S. Attorney's Office, Carol E. Herman, Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 99-00583-CR-PAS.

Before ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

For a second time, Salvador Magluta appeals his 195-year prison sentence imposed after he was convicted of conspiring to commit offenses against the United States in violation of 18 U.S.C. § 371, conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h), obstructing justice by bribing a witness in violation of 18 U.S.C. § 1503, and money

laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). In a prior published opinion we affirmed his conviction for those crimes, but reversed his conviction on another obstruction of justice charge. *United States v. Magluta (Magluta I),* 418 F.3d 1166, 1186 (11th Cir. 2005). Because we reversed his conviction on that one charge, we also vacated the 205-year sentence the district court initially imposed. *Id.*

In this appeal, Magluta contends that the district court: (1) incorrectly calculated the applicable sentencing guidelines range; (2) imposed a procedurally and substantively unreasonable sentence; and (3) violated his Fifth Amendment privilege against self-incrimination by stating at a status conference before the re-sentence hearing that it would only reconsider the length of his sentence if he confessed to the obstruction of justice count that we reversed in his first appeal.[1]

I.

The facts and procedural history of this case are set forth in detail in our earlier opinion. *See Magluta*

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[1] Magluta also contends that the district court violated his Sixth Amendment right to trial by jury and Fifth Amendment right to due process of law by enhancing his sentence based on acquitted, pending, and uncharged offense findings made by a preponderance of the evidence. This argument is foreclosed by the law of this circuit. *See United States v. Rodriguez,* 398 F.3d 1291, 1299 (11th Cir. 2005) (holding that the use of extra-verdict enhancements, under an advisory guidelines regime, is not unconstitutional).

I, 418 F.3d at 1172-73. Because we reversed one of Magluta's convictions, we also vacated his sentence and remanded the case to the district court. We instructed the court as follows:

> If the government elects to dismiss count 8 [which was the conviction we reversed] instead of retry Magluta on that charge, or if a retrial on that count occurs and he is acquitted, the district court shall, at its discretion, either reimpose Magluta's sentence but with a reduction of [ten years] as a result of there being no conviction for count 8, or the court may resentence Magluta on all the other counts for which he remains convicted. If the government elects to retry Magluta on count 8 and he is re-convicted of that charge, the district court shall then re-sentence him on all the counts.

Id. at 1186.

After our mandate issued, Magluta filed motions in the district court asking for a *de novo* resentencing and for the opportunity to be present for any resentence proceeding. The district court held a status conference to address those motions. At the status conference the court heard argument from the government and Magluta on the motions. The court noted that it was inclined not to conduct a *de novo* resentencing and stated that:

> We had a four-day sentencing hearing. [Magluta] had an ample opportunity to present all matters in aid of mitigation,

> [Magluta] allocuted. I had all that I needed. I don't see any change that would create a manifest injustice. If anything, my reasons for departing, I feel even more comfortable given the further developments in the evidence that has come out.

In response to Magluta's counsel's arguments that Magluta was a changed man who was suffering from his incarceration in a harsh prison environment, the district court explained its reluctance to revisit its sentencing decision. The court said:

> [T]he only thing I would ever look for is if the man was able to stand up and tell me – ask the government to take the dismissal [of the count the Eleventh Circuit reversed] back, that I am finally going to be honest with myself and with the rest of the world and admit my guilt.

The court emphasized that it was "not hearing anything that . . . would be a major change that would require me to undertake a *de novo* sentencing." That court was later more direct, saying: "I wanted to cut to the quick. That's the only thing that I'm interested in, is if he is telling you, 'I am ready to say to the government convict me of Count 8.'" After the status conference, the district court granted Magluta's motion to be present at the resentence proceeding, but did not rule on his motion for a *de novo* resentencing. The day before the resentence hearing, Magluta filed a motion asking the district judge presiding over his case to recuse herself. In that motion he argued

that the court's statements at the status conference amounted to court participation in plea negotiations in violation of Federal Rule of Criminal Procedure 11, and showed pervasive bias against him. The court rejected both arguments and denied his motion.

The district court then held a resentence hearing, at which Magluta was present. The court heard argument from Magluta's counsel and from the government, but ultimately decided to impose a 195-year sentence. Magluta was also afforded the opportunity to address the court, which he did. The court did not hear any new evidence and expressly adopted its factfindings and guidelines calculations from the first sentence proceeding. The court did, however, consider the reasonableness of the sentence it imposed in relation to the factors set forth in 18 U.S.C. § 3553(a). After the hearing, the district court entered an "Amended Judgment" imposing a 195-year prison sentence. The amended judgment listed the reason for amending the original judgment as "Correction of Sentence on Remand." This is Magluta's appeal from that amended judgment.

II.

Magluta first contends that the district court incorrectly calculated the applicable guidelines range. Specifically, he argues that the district court miscalculated the value of the funds involved in his money laundering offenses, mistakenly applied a three-level enhancement after finding that Magluta committed

the offenses he was convicted of in this case while he was on release in another case, and incorrectly assigned him 11 criminal history points.

In his first appeal, Magluta raised both the funds calculation and criminal history arguments. *See Magluta I,* 418 F.3d at 1183-85. We did not address those issues head on but instead held that any error regarding them was harmless in light of the district court's statement at the first sentence proceeding that it would depart upward to reach the same sentence even if its guidelines calculations were erroneous. *Id.* at 1184.

Because we have already resolved those two issues and held in the prior appeal that the sentence was not due to be vacated based on them, we decline to revisit them now. *See generally Schiavo ex rel. Schindler v. Schiavo,* 403 F.3d 1289, 1291 (11th Cir. 2005) ("Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case. The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal. . . . Law of the case binds not only the trial court but this court as well." (internal quotation marks and citations omitted; alteration in original)). Magluta argues that the law of the case doctrine does not apply here because in his first appeal we vacated his sentence "in its entirety." That we vacated his sentence does not mean that he is free to raise again contentions that we expressly decided against him in the first appeal.

Magluta asserts that we "expressly declined" to reach those two guidelines range calculation arguments in his last appeal. We disagree. It is true that we did not decide in the first appeal whether the funds calculation and criminal history determinations were correct. *See Magluta I,* 418 F.3d at 1183-85. We did, however, hold that even if they were incorrect it would not matter to his sentence. We explained that even if the district court had miscalculated the amount of the laundered money and had erred in determining his criminal history points, we would still affirm on the basis of the district court's statement that it would upwardly depart to make up any difference. *Id.* at 1183-84. That holding is enforced by the law of the case doctrine in this appeal.

Magluta also argues that the exception to the law of the case doctrine for intervening changes in the law applies. *See Schiavo,* 403 F.3d at 1292 (noting that the law of the case doctrine does not apply where "controlling authority has been rendered that is contrary to the previous decision" (internal quotation marks and citation omitted)). While it is true, as Magluta points out, that *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005), had not been decided at the time of his first sentencing, and as a result the district court did not consider the § 3553(a) factors in arriving at his original sentence, the change announced in *Booker* does not affect the guidelines calculation issues we resolved in the first appeal. And it is the guidelines calculation that Magluta is challenging with these arguments.

Moreover, given the district court's statement at the status conference it held before resentencing Magluta that it felt "even more comfortable" with its "reasons for departing," even if we were free to address the contentions anew, we would reach the same harmless error conclusion about them that we reached in the first appeal. *See id.*; *see also United States v. Hersh*, 297 F.3d 1233, 1248 (11th Cir. 2002).

Finally, we need not consider Magluta's argument that the district court erroneously applied a three-level enhancement under United States Sentencing Guidelines § 2J1.7 (Nov. 1998), because he waived that argument by not raising it in his first appeal. *See United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997) ("Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C.Cir. 1987))). We will not permit Magluta "two bites at the appellate apple." *See United States v.. Fiallo-Jacome*, 874 F.2d 1479, 1482-83 (11th Cir. 1989).

III.

Magluta also contends that the sentence the district court imposed is procedurally and substantively

unreasonable. He argues that it is procedurally unreasonable because the district court miscalculated the applicable guidelines range, but we have already addressed his arguments relating to the district court's calculation of the guidelines range. Magluta also argues that his sentence is substantively unreasonable because it is longer than the sentences others have received for similar crimes and is also longer than the sentences his co-defendants received.

When reviewing a sentence imposed by the district court, we must first determine whether the court correctly calculated the guideline range. *United States v. Winingear,* 422 F.3d 1241, 1245 (11th Cir. 2005). We then review the sentence for reasonableness in light of the factors set forth in 18 U.S.C. § 3553(a). *United States v. Martin,* 455 F.3d 1227, 1237 (11th Cir. 2006). We review only the final sentence for reasonableness, not each individual decision made during the sentencing process. *Winingear,* 422 F.3d at 1245. Reasonableness review is "deferential," and "the party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in light of both [the] record and the factors in section 3553(a)." *United States v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005). As the Supreme Court recently explained, we "must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." *Gall v. United States,* 552 U.S. ___, 128 S.Ct. 586, 591 (2007). When conducting this

review, we consider the totality of the circumstances. *Id.* at 597.

A guideline sentence may be reviewed for procedural or substantive unreasonableness. *United States v. Hunt,* 459 F.3d 1180, 1182 n.3 (11th Cir. 2006). A sentence is procedurally unreasonable if it stems from a procedure that failed to follow the requirements of *Booker. Hunt,* 459 F.3d at 1182 n.3. A sentence may be substantively unreasonable even if it is procedurally reasonable. *Id.*

Under § 3553(a), a sentencing court is charged with imposing a sentence that is "sufficient, but not greater than necessary" to reflect the seriousness of the offense, afford deterrence, protect the public from further crimes of the defendant, and provide the defendant with educational or vocational training, medical care or other treatment. 18 U.S.C. § 3553(a). The district court need not recite a laundry list of the § 3553(a) factors; some indication in the record that the court adequately and properly considered the applicable advisory guideline range and the § 3533(a) sentencing factors is sufficient. *United States v. Scott,* 426 F.3d 1324, 1329 (11th Cir. 2005).

The sentence imposed by the district court was both procedurally and substantively reasonable. The court calculated the applicable guidelines range, recognized the advisory nature of the guidelines, and considered the § 3553(a) factors in imposing Magluta's sentence. The resulting sentence was within the applicable guideline range, which is life

imprisonment.[2] The sentence imposed is procedurally reasonable.

The sentence is also substantively reasonable. As the district court noted, Magluta's crimes were serious and involved a wholesale corruption of our system of justice, *see* 18 U.S.C. § 3553(a)(2)(a), and his criminal activity began in the 1970s, *see id.* § 3553(a)(1). The district court also explained that it was imposing the 195-year sentence to protect society from Magluta and to deter others from engaging in similar criminal conduct. *See id.* § 3553(a)(2)(B), (C).

The district court specifically addressed the disparity between Magluta's sentence and the sentence imposed on one of his co-defendants, noting that the codefendant had entered into a plea agreement which affected his sentence. *See id.* § 3553(a)(6). The court also observed that Magluta's involvement in the plot to obstruct justice was much greater than any of his co-defendants. *See id.* Because the sentence the district court ultimately imposed is within the applicable guideline range, here life imprisonment, and because we see no abuse of discretion in the court's application of the § 3553(a) factors, we conclude that

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[2] Magluta's total offense level was 43, which regardless of the number of criminal history points the district court assigned to him, called for a sentence of life imprisonment. The district court imposed consecutive sentences for each of the counts on which Magluta was convicted to achieve a total sentence with the practical effect of the sentence called for by the guidelines. *See* U.S.S.G. § 5G1.2(d).

Magluta's sentence was also substantively reasonable. *See Talley,* 431 F.3d at 788.

Finally, Magluta argues that imposing consecutive twenty-year sentences for each money laundering offense and the money laundering conspiracy, for a total of 180 years, was unreasonable. We disagree. Only by stacking in this manner, could the district court sentence Magluta within the applicable guideline range in accord with U.S.S.G. § 5G1.2(d), which specifies:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

U.S.S.G. § 5G1.2(d). *See United States v. Davis,* 329 F.3d 1250, 1253-54 (11th Cir. 2003) (holding that § 5G1.2(d) requires sentences to run consecutively to the extent necessary to reach the guideline range).

IV.

Magluta's final contention is that the district court violated his Fifth Amendment privilege against self-incrimination by making remarks at a status conference before the resentence hearing suggesting

that it would only reconsider the length of his sentence if he confessed to the obstruction of justice count which we reversed in his first appeal. The government contends that we should review this claim only for plain error because it was not properly raised in the district court. Magluta argues that the motion for recusal he filed before the resentence hearing was sufficient to preserve this claim for review.

We review constitutional claims not timely raised in the district court only for plain error. *United States v. Moriarty,* 429 F.3d 1012, 1018-19 (11th Cir. 2005). We may, in our discretion, correct plain error where the defendant demonstrates that there is: (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, we may correct a plain error, but only if that error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 1019.

The Fifth Amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The privilege afforded by the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future

criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973).

Magluta's motion for recusal was insufficient to preserve his Fifth Amendment claim for review. Nowhere in that motion did Magluta argue that the district court's statements at the status conference violated his rights under the Fifth Amendment. Instead, the motion sought recusal on the grounds that the district court had actively participated in plea bargaining and was biased against Magluta. Because those legal theories are different from the Fifth Amendment argument Magluta raises in this appeal, and requested different relief, we will review this issue only for plain error. *See generally United States v. Massey,* 443 F.3d 814, 819 (11th Cir. 2006) ("We have held that, for a defendant to preserve an objection to [his] sentence for appeal, [he] must raise that point in such clear and simple language that the trial court may not misunderstand it. When the statement is not clear enough to inform the district court of the legal basis for the objection, we have held that the objection is not properly preserved. The defendant also fails to preserve a legal issue for appeal if the factual predicates of an objection are included in the sentencing record, but were presented to the district court under a different legal theory." (internal quotation marks and citations omitted)).

We conclude that the district court did not commit plain error when it made the statements about which Magluta complains. None of the decisions he relies upon involve potentially coercive

statements delivered in the context of a status conference held to determine whether there would be any point in a full resentence hearing. Nor do those decisions address statements made outside the presence of the defendant. These distinctions are critical because even if the district court did err in saying what it said, the error would not be plain, because there is no controlling authority that deals with facts like those present in this case, and it is not self-evident the statement in the circumstances in which it was made violated the Fifth Amendment. *See United States v. Humphrey,* 164 F.3d 585, 588 (11th Cir. 1999) ("A plain error is an error that is obvious and clear under current law." (internal quotation marks omitted)); *see also United States v. Castro,* 455 F.3d 1249, 1253 (11th Cir. 2006) ("When the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." (internal quotation marks and citations omitted)).

Moreover, even if we were to conclude that the district court did err and that the nature of the error was plain, we still would not reverse because Magluta's substantial rights were not affected. When we remanded this case after Magluta's first appeal, we instructed the district court that it could, "at its discretion, either reimpose Magluta's sentence but with a reduction of [ten years] as a result of there being no conviction for [one of the obstruction of justice counts], or the court may resentence Magluta

on all the other counts for which he remains convicted." *Magluta I,* 418 F.3d at 1186. The district court imposed the same sentence on remand, less the ten years for the obstruction of justice count which the government elected to dismiss.

In order to show that his substantial rights were affected by the district court's statement, Magluta would have to carry his burden of establishing that there is a reasonable probability he would have received a different sentence but for the district court's statement. *See United States v. Rodriguez,* 398 F.3d 1291, 1299-1302 (11th Cir. 2005). He has not done that.

AFFIRMED.

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Salvador MAGLUTA, a.k.a. Sal,
Defendant-Appellant.
No. 03-10694.

July 27, 2005.

Jack M. Denaro, Jack M. Denaro, P.A., G. Richard Strafer, G. Richard Strafer, P.A., Miami, FL, Bruce Rogow, Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Defendant-Appellant.

Madeleine R. Shirley, Anne R. Schultz, U.S. Atty., Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES and COX, Circuit Judges, and MILLS*, District Judge.

CARNES, Circuit Judge:

In August of 2002, a jury convicted Salvador Magluta of twelve counts: eight counts of laundering drug proceeds, and one count each of conspiracy to launder drug proceeds, conspiracy to obstruct justice, obstruction of justice by bribing a witness,

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

and obstruction of justice by bribing a juror. The jury also returned a special forfeiture verdict requiring Magluta to forfeit $15 million in currency, and also some real property.

In January of 2003, the district court sentenced Magluta to 2,460 months (205 years) in prison. The total sentence was rang up this way: 240 months on each of the eight substantive drug proceeds laundering counts; 240 months on the conspiracy to launder count; 60 months on the conspiracy to obstruct justice count; 120 months on the obstruction by bribing a juror count; and 120 months on the obstruction by bribing a witness count. Each sentence was made consecutive to every other one.

Magluta asserts that his convictions on a number of the counts must be reversed and also that his sentence was incorrectly calculated. First, he contends that his convictions on all nine of the money laundering counts (eight substantive and one conspiracy) must be reversed on collateral estoppel grounds. The basis for this contention is that six years before this trial he was acquitted of substantive drug offenses, and evidence of those offenses was used to prove the money laundering charges in this trial. Second, Magluta contends that the evidence was insufficient to support his convictions on the eight substantive money laundering counts.

Magluta's third and fourth contentions attack his conviction on the obstruction of justice through juror bribery count. He argues that it must be reversed

because the district court erred in admitting certain out-of-court statements of a bribed juror under the co-conspirator exception to the hearsay rule contained in Fed. R. Evid. 801(d)(2)(E). He also argues that this conviction must be reversed because the district court did not give a special unanimity instruction geared to the identity of the juror who was allegedly bribed.

Fifth, Magluta contends that documentary evidence vital to several of his convictions was seized and admitted at trial in violation of his Fourth Amendment rights thereby tainting some of his convictions. If we agree, he asks that we remand to the district court with instructions for it to determine which of his convictions were tainted by this assertedly erroneously introduced evidence. Finally, Magluta makes several arguments that his sentence was incorrectly calculated. We will address each of these six major contentions in the order we have listed them.

I.

Magluta's attack on his money laundering convictions in this case centers around his 1996 acquittal on all of the twenty-four drug-related counts against him. In that earlier case the district court granted judgments of acquittal on seven counts, and the jury acquitted Magluta of all of the remaining ones. Among the charges for which Magluta was acquitted in the earlier trial were: operating a continuing criminal enterprise from January 1978 through April

1991; conspiring to import and distribute cocaine during that same period of time; and engaging in a number of substantive drug importation and distribution offenses from 1986 through 1989. The continuing criminal enterprise count in that earlier case incorporated all of the conspiracy and substantive drug offenses that were separately charged in that case.

Magluta contends that the 1996 acquittal established that he was not involved in drug offenses during the periods of time charged in that case, which include the times when the crimes charged in this case took place. His position is that the government was collaterally estopped from introducing in this case evidence of drug offenses allegedly committed during the periods of time covered by the charges in the first case. The district court disagreed, and so do we.

The government did introduce in this case evidence of criminal activity for which Magluta had been acquitted in the earlier case. The money laundering conspiracy charged in this case involved criminal activity beginning in January 1979 and extending through December 2001, and the substantive money laundering charges involved criminal activity that occurred in October and December 1998. In proving those charges in this case, the government introduced evidence of illegal drug activities that had taken place between 1978 and 1991, which is the period of

time alleged in indictment in the earlier case where Magluta was acquitted.[1] The government used evidence of that criminal activity in order to establish in this case the "specified unlawful activity" element, 18 U.S.C. § 1956(a)(1)(B)(i), of the money laundering charges against Magluta.[2]

"The doctrine of collateral estoppel is a narrow exception to the Government's right to prosecute a defendant in separate trials for related conduct." *United States v. Brown,* 983 F.2d 201, 202 (11th Cir. 1993); *see also United States v. Garcia,* 78 F.3d 1517, 1521 (11th Cir. 1996). Collateral estoppel "bars a subsequent prosecution only where a fact or issue

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[1] As we say in the text, Magluta was acquitted in the 1996 trial of charges that he had committed drug offenses beginning in 1978. He said during that trial he had ceased all illegal drug activities in 1980. As a consequence of his having acknowledged that he had engaged in drug activities until some time in 1980, Magluta has narrowed the issue he is raising in this case to whether the government was collaterally estopped from attempting to prove that he engaged in illegal drug activities between 1980 and 1991.

[2] To prove that Magluta engaged in money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), the government had to establish that: (1) Magluta conducted or attempted to conduct a financial transaction; (2) the transaction involved the proceeds of a statutorily specified unlawful activity; (3) Magluta knew the proceeds were from some form of illegal activity; and (4) Magluta knew a purpose of the transaction was to conceal or disguise the nature, location, source, ownership, or control of the proceeds. *See United States v. Majors,* 196 F.3d 1206, 1212 (11th Cir. 1999). Felony drug offenses qualify as a "specified unlawful activity" as that term is used in § 1956. *See* 18 U.S.C. §§ 1956(c)(7)(B)(i) & (A), 1961(1).

necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial." *Brown,* 983 F.2d at 202; *see also Garcia,* 78 F.3d at 1521.

Applying the collateral estoppel doctrine requires a two-step analysis:

> First, a court must decide whether it can ascertain the basis of the acquittal at the first trial. More precisely, a court must determine whether the jury's verdict of acquittal was based upon reasonable doubt about a single element of the crime which the court can identify. [Second], the court must then decide whether that element is also an essential element of the crime for which the defendant was convicted in the second trial.

Brown, 983 F.2d at 202. "'[T]he identity of overlapping elements required for collateral estoppel must extend beyond the legal definition of the elements.' There also has to be such factual identity of the issues that '[t]he subsequent verdict of conviction [is] rationally inconsistent with the prior verdict of acquittal.'" *Garcia,* 78 F.3d at 1521 (quoting *Brown,* 983 F.2d at 202). The burden of persuasion is on the defendant as to both steps of the analysis. *Id.; Brown,* 983 F.2d at 202.

As for the first step, Magluta argues that the basis of his 1996 acquittal was that he had ceased all drug trafficking activities in May 1980. This has to have been the basis for his acquittal, Magluta says, because it was the only defense he put forward to the

crimes alleged in his 1996 trial. We can assume without deciding that Magluta is right about this point, and thereby satisfies the first step of the collateral estoppel test, because he does not satisfy the second one.

The second step of the collateral estoppel test requires Magluta to establish that the elements of the crime on which the prior acquittal was based are also essential elements of the crime for which he was convicted at the second trial. *See Garcia,* 78 F.3d at 1521; *Brown,* 983 F.2d at 202. That is to say, Magluta must show that the elements of the drug offenses which led to his acquittal in the 1996 trial are essential elements of the money laundering offenses for which he was convicted in this case.

Even if we accept for present purposes Magluta's premise that his 1996 acquittal established he was not involved in the illegal drug activity with which he had been charged in that earlier case, his argument still fails. It fails because Magluta's personal involvement in, or guilt of, the criminal activity charged in the earlier case is not an element of the money laundering charge he was convicted of in this case. This indictment charged Magluta with money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), with the specified unlawful activity being felony drug offenses. The government had to prove that Magluta, with the requisite knowledge and intent, conducted a financial transaction involving the proceeds of felony drug offenses. *See Majors,* 196 F.3d at 1212. The government did not have to prove, however, that Magluta

committed the felony drug offenses. *See id.* As far as the money laundering statute is concerned, laundering someone else's illegal proceeds is just as bad as laundering your own – there is no help-thy-neighbor exception to § 1956(a)(1)(B)(i). Accordingly, the collateral estoppel effect of Magluta's 1996 acquittal of illegal drug activity does not extend to any of the essential elements of the money laundering charges on which he was convicted in this case.

II.

Magluta challenges the sufficiency of the evidence to support his convictions on the eight substantive money laundering counts. While phrased in sufficiency of the evidence terms, Magluta's actual challenge here raises the issue of whether the relevant facts, which are essentially undisputed, constitute money laundering. As we have mentioned, Magluta was convicted of money laundering conducted for the purpose of concealing the nature, location, source, ownership, or control of the illegal drug proceeds, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The charges and evidence centered on the fact that Magluta had paid his lawyers with checks written from an Israeli bank account held under a fictitious name.

On September 10, 1998, Richard Passapera, a Magluta associate, delivered $1.2 million in illegal drug proceeds to Antonio Garcia, another Magluta associate, in Miami. Unbeknownst to Passapera and

Magluta, however, Garcia had become an FBI informant. Garcia turned the money over to the FBI, which transported it to New York where it gave the money back to Garcia in order to complete the transaction. In New York, Garcia gave the money to Harry Kozlik and Isaac Benatar, who were also Magluta associates. Kozlik transported the money to Israel and deposited it in an Israeli bank under the fictitious name of "Leonard Friedman." Kozlik eventually provided Garcia with eight blank checks issued from the account. Garcia, at the direction of the FBI, passed the checks on to Passapera. Magluta then used the checks to pay his lawyers.

Magluta makes three arguments to support his position that the established facts about what happened to the drug proceeds are not sufficient to make out money laundering. His first argument is that, because the proceeds had been under the control of law enforcement before he used them to pay his lawyers, the money had lost its "tainted" character and was no longer proceeds of a specified illegal activity in the sense required by § 1956(a)(1)(B)(i). Unable to find a money laundering decision of any court on point with his position, Magluta asks us to draw an analogy to stolen property cases, where property loses its "stolen" character once it is recovered and controlled by law enforcement. *See, e.g., United States v. Cohen,* 274 F. 596, 599 (3d Cir. 1921). We are not persuaded to do that.

The plain language of the money laundering statute requires that the "financial transaction . . . in

fact involves the proceeds of [a] specified unlawful activity." 18 U.S.C. § 1956(a)(1). But there is nothing in the statutory language to suggest that, in addition to being from a specified unlawful activity, the proceeds must never have been in the control of the government before they reached the defendant. It seems to us that laundered money does not become any less laundered because the government helped the process along or chose not to stop it. Having said that, we are not asked to decide whether government intrusion into laundering transactions ever could rise to the level that the money no longer qualifies as the "proceeds of [a] specified unlawful activity" under § 1956(a)(1). All we must decide here is whether the level of government involvement in this case was enough to change the nature of the proceeds. On the facts of this case, it was not.

Magluta's second argument is that allowing actual drug proceeds which have been in the possession of the government to form the basis for a conviction under § 1956(a)(1) would make the money laundering "sting" statute, 18 U.S.C. § 1956(a)(3), superfluous.[3] Sections 1956(a)(1) and 1956(a)(3) cover

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[3] 18 U.S.C. § 1956(a)(1) states:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which *in fact* involves the proceeds of specified unlawful activity –
>
> . . . .

(Continued on following page)

different situations. The (a)(1) subdivision covers situations where the proceeds are actually from a specified unlawful activity. 18 U.S.C. § 1956(a)(1). The (a)(3) subdivision covers situations where the government, or some person at the direction of the

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(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

. . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Id. (emphasis added).

18 U.S.C. § 1956(a)(3) states:

Whoever, with the intent –

. . . .

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

. . . .

conducts or attempts to conduct a financial transaction involving property *represented to be* the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

Id. (emphasis added).

government, represents that the proceeds are from a specified unlawful activity though in reality they are not. *Id.* § 1956(a)(3). The two provisions serve different purposes. Neither provision is rendered superfluous by our holding that the level of government involvement in the laundering in this case was not enough to cleanse these "proceeds of specified unlawful activity" of their taint for § 1956(a)(1)(B)(i) purposes.

Magluta's third argument on this issue is that by the time he wrote the checks to his lawyers the money had already been laundered; therefore, he says, his acts amounted to mere spending for his personal benefit, not laundering in violation of § 1956(a)(1)(B)(i). We have stated that payments for personal benefit out of previously laundered proceeds do not themselves constitute money laundering unless they are designed to conceal the nature or source of the money. *See Majors,* 196 F.3d at 1213 (internal quotation and marks omitted).

We have set out several factors that are helpful in determining whether a transaction was designed to conceal as required by § 1956(a)(1)(B)(i). "Evidence that may be considered when determining whether a transaction was designed to conceal includes, among others, statements by a defendant probative [o]f intent to conceal; unusual secrecy surround[ing] the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to

conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals." *Id.* at 1213 n.18 (emphasis omitted).

Magluta paid his lawyers with checks written on an Israeli bank account held in a fictitious name. The several transfers of cash between Magluta associates, the movement of the cash from Miami to New York to Israel, and the use of a foreign account held in a false name are "a series of unusual financial moves" which culminated in Magluta writing the checks. *See id.* There thus was an air of "unusual secrecy surround[ing] the transaction[s]." *See id.* Magluta's use of his associates, as well as the fictitious "Leonard Friedman," demonstrate his use of "third parties to conceal the real owner" of the money in the foreign account. *See id.* The final transaction itself – Magluta writing checks on a foreign account held in a false name – is "highly irregular." *See id.*

In sum, Magluta went to great pains to conceal the fact that he was using drug proceeds to pay his lawyers. His doing so meets the definition of money laundering for purposes of § 1956(a)(1)(B)(i), even if the final transfer of the laundered proceeds was also for Magluta's personal benefit. *See Majors,* 196 F.3d at 1213 & n.18; *cf. United States v. Abbell,* 271 F.3d 1286, 1298 (11th Cir. 2001) ("We believe it is enough for [§ 1956(a)(1)(B)(i)] that [the] Defendants engaged in transactions from which Rodriguez-Orejuela received a benefit (and moneys were paid on behalf of Rodriguez-Orejuela) while concealing that

Rodriguez-Orejuela was the source of the funds."). Magluta's convictions on the substantive money laundering counts stand.

III.

Magluta's third major contention is that his conviction for obstruction of justice through juror bribery must be reversed because the district court erred in admitting two out-of-court statements made by Miguel Moya, who had been the jury foreman in the 1996 trial. The government used those statements to prove that Magluta had bribed Moya to produce an acquittal in that earlier case.

The first of the two statements in question was made by Moya to undercover FBI Agent Joaquin Garcia in a recorded conversation that took place in July 1998. In that conversation Garcia told Moya that he had been sent by Magluta (and Magluta's co-defendant in the 1996 trial, Augusto Falcon) to ensure that Moya kept quiet about the bribe he had received two-and-a-half years earlier. After prodding by Garcia, Moya acknowledged having accepted that bribe from Magluta and his co-defendant Falcon.[4] Moya assured Garcia that only his wife and parents knew he had received the bribe money, and he

[4] We have no way of knowing exactly how large the bribe was that Moya received. The record does show, however, that although Moya and his family were of modest means, they made $330,000 in cash expenditures and bank deposits in the twenty-seven months following the trial.

promised Garcia that he would not cooperate with authorities.

The court admitted Moya's statements as non-hearsay statements of a co-conspirator under Fed. R. Evid. 801(d)(2)(E). "We review the district court's evidentiary rulings for an abuse of discretion," *United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003), and we may overturn findings of fact only if clearly erroneous, *United States v. Griggs*, 735 F.2d 1318, 1325 (11th Cir. 1984).

"Under Rule 801(d)(2)(E), statements of co-conspirators made during the course and in furtherance of the conspiracy are not hearsay. For evidence to be admissible under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence these things: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy. In determining the admissibility of co-conspirator statements, the trial court may consider both the co-conspirator's statements and independent external evidence." *Hasner*, 340 F.3d at 1274. In ruling on the admissibility of the conversation between Moya and Agent Garcia under Rule 801(d)(2)(E), the district court found that:

> [T]his conspiracy continued to exist up through July of 1998, when this statement was made. The Court does find that although Mr. Moya's participation was in just one component, he was a participant in the overall

> scheme. He would not have known all of the ins and outs of the conspiracy that's charged in this Indictment, but . . . in agreeing to . . . accept[ ] the bribe for convincing the other jurors to return a judgment of acquittal, he is still a member of the conspiracy.
>
> He sat and listened to the evidence in the case . . . that Mr. Falcon and Mr. Magluta were participants in a major drug trafficking organization; that the monies that were connected with them were proceeds of a major drug trafficking organization. . . . I find that the government has proved by a preponderance of the evidence that . . . [Moya] knew that the [bribe] money was from a specified unlawful activity and, therefore, he took actions to cover up his sudden found wealth in creating all of the various gifts of funds to his relatives and near relatives and friends. . . . So his participation and his actions continue to evidence efforts to cover up his criminal acts. The law does find that such conduct of covering up the acts are part and parcel of the conspiracy.

Magluta argues that if he and Moya conspired to obstruct justice through juror bribery, the central purpose of that conspiracy ended, at the latest, once the verdict in the earlier case was rendered in February 1996. As a result, according to Magluta, Moya's conversation with the undercover FBI agent, which took place in July 1998, was not made during the course of the juror bribery conspiracy but instead came well after the conspiracy had ended.

In *Grunewald v. United States,* 353 U.S. 391 (1957), the Supreme Court held that: "[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02. The Court also recognized that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Id.* at 405.

The central purpose of the juror bribery conspiracy between Magluta and Moya was to secure an acquittal for Magluta in return for cash. Once the verdict was rendered, that central purpose was completed. Although it was mutually understood that Magluta and Moya would conceal the bribe, in the Supreme Court's words, those "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." *Id.* at 402. In light of *Grunewald,* we cannot infer that a subsidiary conspiracy to conceal the bribe Magluta had given Moya existed for almost two-and-a-half-years after the bribery agreement had been made and carried out. *See id.* at 401-02. As a

result, Moya's statement to Agent Garcia was not in furtherance of the conspiracy to obstruct justice through juror bribery.

The government argues, and the district court's findings indicate it believed, that Moya's statements are admissible under Rule 801(d)(2)(E) on the ground that it was in furtherance of another conspiracy. Under this theory, there was a conspiracy between Magluta and Moya to launder drug proceeds in violation of § 1956(a)(1)(B)(i). That conspiracy would have begun when Moya accepted the bribe from Magluta, which was paid out of illegal drug proceeds, and it was still ongoing at the time Moya assured Agent Garcia that he would keep quiet about it.[5]

We will assume for the moment that Moya's acceptance of the bribe made him and Magluta participants in a conspiracy to launder drug proceeds under 18 U.S.C. § 1956(a)(1)(B)(i). *Cf. Abbell,* 271 F.3d at 1298 (affirming the defendant lawyers' convictions for violating § 1956(a)(1)(B)(i) where the lawyers gave money to certain inmates while concealing that the money was being paid at the direction of and on behalf of the lawyers' client). Even with that assumption the argument fails under *Grunewald,* because

[5] That this conspiracy was not charged in the indictment in this case does not matter. *United States v. Salisbury,* 662 F.2d 738, 740 (11th Cir. 1981) ("Statements of a coconspirator may be introduced into evidence even though the government has not charged [the coconspirator] with conspiracy as long as the existence of the conspiracy has been properly established.").

Moya's statements to Agent Garcia were not made during the course of and in furtherance of that money laundering conspiracy.

As we mentioned before, Moya's statements to Agent Garcia occurred two-and-a-half years after Moya accepted the bribe. Assuming Magluta's payment of the bribe to Moya constituted a conspiracy between them to launder drug proceeds in the amount of the bribe, the evidence does not support an inference that the initial conspiracy included a "subsidiary conspiracy to conceal" which was ongoing so long after the bribe – the single act of money laundering – had occurred. *See Grunewald,* 353 U.S. at 401-02.

Moya's statements to Agent Garcia do constitute an attempt to keep any initial conspiracy secret, but that attempt is not enough by itself to establish the coverup two-and-a-half years later was part of the initial agreement between Magluta and Moya. As the Supreme Court explained: "[E]very conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." *Id.* at 402.

That Moya tried to hide the source of the funds he used to make purchases for himself and his family does not bring those acts into any earlier drug laundering conspiracy between Magluta and Moya. Whatever crimes Moya may have committed by concealing the source of the funds that he used to pay for his purchases, there is no evidence to suggest that making them was part of the initial conspiracy between him and Magluta. Otherwise, the government could have charged Magluta with money laundering for every purchase Moya made with the bribe proceeds; that would not be a reasonable interpretation of the conspiracy and money laundering laws. Because the later transactions that Moya engaged in were not part of the "initial agreement" between him and Magluta, *see Grunewald*, 353 U.S. at 402, they do not extend the life of the money laundering conspiracy that began in January of 1996 to include Moya's July 1998 statements to Agent Garcia. As a result, the district court should not have admitted Moya's statements to Agent Garcia pursuant to Rule 801(d)(2)(E).

The government argues that, even if the district court erred by admitting Moya's statements to Agent Garcia, the error was harmless because it presented other evidence to support the obstruction of justice through juror bribery conviction. As we have previously made clear, a "non-constitutional error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the verdict, 'or had but very slight effect.'" *United States v. Hornaday*, 392 F.3d 1306, 1315 (11th Cir. 2004)

(citations omitted) (quoting *Kotteakos v. United States,* 328 U.S. 750, 762, 764 (1946)). Furthermore, "[i]f one can say 'with fair assurance . . . that the judgment was not substantially swayed by the error,' the judgment is due to be affirmed even though there was error." *Id.* at 1315-16 (quoting *Kotteakos,* 328 U.S. at 764). The government has not met this standard.

Moya's statements to Agent Garcia constituted the evidence directly tying Magluta to the bribe. Even if we were to consider Moya's statement to his then-wife (the other statement that Magluta asserts was erroneously introduced), we are left only with the conclusion that Moya was bribed, not that it was Magluta who paid the bribe.[6] Although common sense would suggest that Magluta was involved, Magluta was being tried with a co-defendant who had as much reason to bribe jurors as Magluta did. With no other direct evidence linking Magluta to the bribe, we

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[6] Moya's ex-wife testified that on January 31, 1996 (which was during Magluta's previous trial) at approximately six o'clock in the evening Moya received a telephone call at home from a man named Eddy. In response to the call Moya left the house, and two to three hours later came back carrying a brown paper bag. Ms. Moya asked him what was in it. He showed her the contents of the bag: bundles of cash. She testified that when she asked Moya what the money was for, "[h]e said it was given to him in order to persuade the jury in the trial that he was on." According to Ms. Moya, when she asked her husband why he had taken the bribe, Moya told her that "[h]e had to do it," and "he couldn't get out of what he was doing." She did not testify that Magluta was mentioned.

"cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error." *See Kotteakos,* 328 U.S. at 765. The error, therefore, was not harmless. For these reasons, Magluta's conviction for obstruction of justice through juror bribery is due to be reversed.[7]

IV.

Magluta's fourth contention is that his conviction on the obstruction of justice through juror bribery count must be reversed for an additional reason. He argues that the district court erred when it failed to instruct the jurors in this case not to convict on this count unless they unanimously agreed on which juror or jurors Magluta had bribed in the earlier case. Because we have already decided to reverse the conviction on this count for other reasons, we need not address this contention any further.

V.

Magluta's fifth contention is that the district court erred by denying his motion to suppress cer tain documents seized on October 15, 1996. Those documents were found inside a box that was seized without a warrant from the trunk of a car driven by Marilyn Bonachea, an associate of Magluta. Magluta

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[7] In light of this conclusion, we have no reason to address the issue Magluta has raised involving the admission of the statements Moya made to his wife at the time.

argues that the officers lacked probable cause to search the box of documents and, as a result, his Fourth Amendment rights were violated.

On October 15, 1996, which was after Magluta was acquitted in the first trial, Guy Lewis, then an Assistant United States Attorney in Miami, received an anonymous telephone call. The caller advised Lewis that later that morning Bonachea would be transporting certain documents from her home to the office of Magluta's lawyer. Lewis knew Bonachea was a close associate of Magluta. The caller said that the documents Bonachea would be transporting contained information relating to the ongoing Magluta investigation, including information about how drug money had been used to bribe individuals to give false testimony in the earlier trial. The caller said that Bonachea would be leaving her home in south Dade County at a specified time and gave the address. The caller also told Lewis that Bonachea would be driving a rental car, which the caller described, and that Bonachea commonly smoked marijuana when driving.

This was the second call AUSA Lewis had received from this anonymous caller. The previous call had provided Lewis with an address for Bonachea's son at Bonachea's home, the same address from which the caller said that Bonachea would be leaving later that day.

Immediately after receiving the second call, AUSA Lewis contacted Special Agent Jane Anglestead

of the Drug Enforcement Agency and Sergeant Robert Fielder of the Miami Police Department, both of whom were investigating Magluta and knew of his intimate relationship with Bonachea. Anglestead had been involved in prosecutions of Magluta since 1991. She knew from Bonachea's testimony in those cases that she had been associated with Magluta for a long time. Anglestead was also aware that at some time in the 1980s Bonachea had received approximately $585,000 from Magluta for the purchase of a house in South Florida, a house that was located adjacent to Magluta's property. Anglestead knew that two of the checks used for the house had come from a Bahamian account that Magluta maintained under another name. Furthermore, Anglestead was aware that Bonachea had frequently visited Magluta while he was incarcerated in a federal detention center awaiting trial. Based on this knowledge, Anglestead surmised that Bonachea might very well have the kind of documents described by the anonymous caller.

Shortly after being told by AUSA Lewis of the anonymous call earlier in the day, Agent Anglestead went to Bonachea's residence. The residence was at the address the caller had said it was. There Anglestead saw a rental vehicle matching the caller's description, and watched Bonachea leave the house within twenty minutes of the time that the caller had predicted. Florida Highway Patrol officers, who had been contacted by Sergeant Fielder, followed Bonachea.

After determining that Bonachea was speeding, the officers pulled her over. They confirmed with her that the car was a rental. One trooper noticed what appeared to be marijuana seeds in the ashtray. As a result, he called in a drug dog who, after examining the car, alerted to the console area where two marijuana cigarettes were then found. Bonachea was arrested and the trooper inventoried the vehicle, noting the parcels of paperwork in the trunk. Sergeant Fielder then arrived at the scene and informed Bonachea that he was going to inspect the vehicle. Bonachea objected, claiming that there were documents in the trunk stamped "attorney-client privilege." Fielder proceeded to open the trunk and found a cardboard box containing, among other things, what he recognized as drug ledgers.

The magistrate judge's report recommended that Magluta lacked standing to object to any alleged violation of the Fourth Amendment and that, in any event, law enforcement had probable cause to search the trunk. The district court, with the exception of two factual details not relevant here, adopted the magistrate judge's factual findings and legal conclusions and denied Magluta's motion to suppress.

Magluta challenges both the district court's decision that he lacked standing and its decision that law enforcement had probable cause to search Bonachea's trunk. "[W]e apply a mixed standard of review to the district court's denial of the suppression motion, reviewing the court's findings of fact for clear error and its application of the law to those

facts *de novo.*" *United States v. Tinoco,* 304 F.3d 1088, 1116 (11th Cir. 2002). Because we find that the district did not err in determining that the law enforcement officers had probable cause to search the contents of Bonachea's car, we will assume, without deciding, that Magluta has standing to allege a Fourth Amendment violation.

In most circumstances, for a search that is not based on consent to comply with the Fourth Amendment, law enforcement must obtain a warrant supported by probable cause. There are, however, exceptions. Under the automobile exception to the warrant requirement, officers can search any container in an operational car without a warrant as long as they have probable cause to believe that the container holds evidence of a crime. *California v. Acevedo,* 500 U.S. 565, 579-80 (1991); *United States v. Watts,* 329 F.3d 1282, 1286 (11th Cir. 2003). Because there is no dispute that the car Bonachea was driving was operational, our inquiry is limited to determining whether the officers had probable cause to believe that the box in her car contained evidence of a crime. *See Watts,* 329 F.3d at 1286. "Probable cause for a search exists when under the totality of the circumstances 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Goddard,* 312 F.3d 1360, 1363 (11th Cir. 2002) (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)).

Under the circumstances of this case, the anonymous tip received earlier in the same day is

entitled to substantial weight in the analysis of whether law enforcement had probable cause to believe that the box in Bonachea's trunk contained evidence of criminal activity. *See generally Gates,* 462 U.S. at 237-39 (noting that anonymous tips are considered in the probable cause determination). In addition to notifying law enforcement that Bonachea's car would be carrying documents evidencing drug activity, the caller provided the correct location of Bonachea's residence, an accurate description of the rental car she would be driving, and predicted that Bonachea would depart within twenty minutes of the time she actually did. The caller was also correct about Bonachea's smoking marijuana in the car. (A fact discovered after the car was lawfully stopped for speeding.) All of this information from the caller was corroborated by law enforcement officers before the box in the trunk of Bonachea's car was searched. *See id.* at 241 ("Our decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work.").

Furthermore, on a previous occasion, this same caller had provided AUSA Lewis with the address where Bonachea's son was staying. That was the same address that Bonachea left from on October 15, 1996, as the caller had said she would, and at about the time the caller had said. The law enforcement officers were also aware of Bonachea's intimate relationship with Magluta, that she knew his organization, and that she often visited him in jail. From

these facts, they reasonably inferred that Bonachea was a person likely to be holding for Magluta the kind of documents described by the anonymous caller. All of these pieces of information bolster the caller's credibility.

Based on the totality of the circumstances leading up the search, we conclude that the district court did not err in holding that the law enforcement officers had probable cause to believe that the box located in the trunk of Bonachea's rental car contained evidence of a crime.

VI.

The remainder of Magluta's contentions attack his 205-year sentence. Because we have already decided that Magluta's conviction for obstruction of justice through juror bribery must be reversed, on remand it will be necessary for the district court to strike the 120-month sentence imposed for that count. Striking that 120-month sentence will leave Magluta with a sentence of 195 years imprisonment.

Magluta contends that this remaining portion of his sentence must be vacated for other reasons. For one thing, he argues that the district court erred in determining that the value of the drug money he had laundered was $35,498,957.80, a determination that affected his total offense level. According to Magluta, the jury's special forfeiture verdict of $15 million should have been a cap on the value of the funds that the district court could find were involved in the

money laundering scheme for purposes of calculating his specific offense characteristics pursuant to U.S.S.G. § 2S1.1(b)(2) (2000). If Magluta is correct about this, his total offense level should have been 41 instead of 43. *See* U.S.S.G. § 2S1.1(b) (2000).

Magluta casts this argument in collateral estoppel terms, saying that "[t]he district court violated principles of collateral estoppel by refusing to accept the jury's special forfeiture verdict of $15 million as a cap on the 'value of the funds' laundered." Appellant's Initial Br. at 51. The court was collaterally estopped, according to Magluta, because the jury's forfeiture inquiry matches exactly the § 2S1.1(b)(2) inquiry the judge was to make at sentencing, and the same preponderance of the evidence standard of proof was applicable to the jury and the judge.

We need not decide if the district court erred in calculating Magluta's offense level using an amount greater than the $15 million figure that the jury found in its special forfeiture verdict, because we would not vacate the sentence even if the court did. Having reviewed the record, we are convinced that any error of that nature was harmless. *See United States v. Hersh*, 297 F.3d 1233, 1248 (11th Cir. 2002) (sentencing errors are reviewed for harmless error). During the course of the sentencing hearing, the district court stated: "Should the Eleventh Circuit determine that the Court's reasoning [in arriving at the guidelines range] is in error, I would employ an upward departure to impose a sentence outside of the Guideline range under the applicable law to reach the

same result. And that is a departure to offense level 43 requiring a life sentence." Sentencing Tr. at 691. In other words, the district court said that it would get to an offense level of 43 one way or the other.

The district court recognized that it "must impose a sentence within the Sentencing Guidelines unless [it] determines that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines." Sentencing Tr. at 692. After discussing the permissible grounds for upward departures, the district court concluded that, if necessary to get to an offense level of 43, an upward departure would be warranted in this case based on "the anomaly created by the obstruction" resulting in Magluta's 1996 acquittal, as well as other non-specified factors that were present in this case. Apparently, the anomaly the district court was referring to had to do with the fact that, through his illegal conduct, Magluta escaped the punishment he deserved for the criminal conduct he was tried for in his 1996 trial. In summing up, the district court stated that "the bribery of jurors, the bribery of witnesses, so goes to the heart of our criminal justice system which is the foundation of our democracy that the egregious nature of the offense here could only be recognized by an upward departure, and that the present Sentencing Guidelines do not take it into consideration, and that for those

reasons the Court would upward depart."[8] Sentencing Tr. at 694-95.

If the district court had upwardly departed, we would review that decision only for abuse of discretion. *United States v. Melvin,* 187 F.3d 1316, 1320 (11th Cir. 1999). Furthermore, "[b]ecause the district courts see so many Guidelines cases, district courts have an institutional advantage over appellate courts in determining whether a case is outside the heartland, and thus their decisions are entitled to substantial deference." *Id.* (citing *Koon v. United States,* 518 U.S. 81, 98 (1996)). With that in mind, we cannot say that the district court would have abused

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[8] Our reversal of Magluta's conviction for obstruction by bribing a juror does not undermine the factual premise of the district court's preemptive departure decision. Our reversal was based on our conclusion that the juror's out-of-court statements to the undercover agent were hearsay; that is, the statements did not fit within Fed. R. Evid. 801(d)(2)(E). However, it is well-established that, in sentencing, a district court can consider hearsay even if it was not admissible in determining guilt, so long as there are sufficient indicia of reliability. *United States v. Wilson,* 183 F.3d 1291, 1301 (11th Cir. 1999) ("A court may consider any information (including hearsay), regardless of its admissibility at trial, in determining whether factors exist that would enhance a defendant's sentence, provided that the information is sufficiently reliable."); U.S.S.G. § 6A1.3(a) ("[T]he court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see also* 18 U.S.C.A. § 3661. The tape-recorded statements of the juror to the undercover agent clearly have sufficient indicia of reliability for this purpose.

its discretion in upwardly departing. *See* U.S.S.G. § 5K2.0 (describing permissible grounds for upward departures). As a result, any two-point error in Magluta's offense level was harmless.

Magluta also contends that the district court erred in calculating his criminal history score. Specifically, he asserts that the district court impermissibly considered his previous convictions as "prior sentences" under U.S.S.G. § 4A1.1(a). This is error, Magluta says, because his previous convictions were all "part of the instant offense" under § 4A1.2(a)(1), even though they occurred before this trial began. If Magluta were correct about this, his criminal history score was miscalculated. We need not decide whether this argument has any merit, for much the same reason we did not have to decide whether Magluta's argument about his offense level had any merit. The district court gave a valid basis for an upward departure to an offense level of 43 and that departure would not have been an abuse of discretion. Because an offense level of 43 mandates a life sentence regardless of the criminal history category, U.S.S.G. ch. 5, pt. A, any error in the calculation of Magluta's criminal history score is harmless.

Magluta's next assertion is that the district court erred by ordering each of the sentences for his convictions to run consecutively pursuant to U.S.S.G. § 5G1.2(d). He concedes that this position is foreclosed by our decision in *United States v. Davis*, 329 F.3d 1250 (11th Cir. 2003) (per curiam). That decision held § 5G1.2(d) requires that sentences run

consecutively to the extent necessary to reach the punishment range set by the guidelines. *Id.* at 1253-54. Magluta argues, however, that *Davis* has been invalidated by *United States v. Booker,* 543 U.S. ___, 125 S. Ct. 738 (2005). It has not been. *Booker* invalidated neither § 5G1.2(d) nor *Davis.* Instead, as one of our post-*Booker* decisions explained, *Booker* held that "the Sixth Amendment right to trial by jury is violated where under a mandatory guidelines system a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." *United States v. Rodriguez,* 398 F.3d 1291, 1298 (11th Cir.) (emphasis omitted), *cert. denied,* ___ U.S. ___, 125 S. Ct. 2935 (2005). The *Booker* decision also established that it is "error for the district court to sentence [a defendant] under a mandatory Guidelines scheme, even in the absence of a Sixth Amendment enhancement violation." *United States v. Shelton,* 400 F.3d 1325, 1330-31 (11th Cir. 2005). To remedy the situation, the Court in *Booker* effectively rendered the guidelines advisory. *See Booker,* 125 S. Ct. at 764. The *Booker* decision affected *Davis* only to the extent that all guidelines decisions are now advisory. *Davis*' holding as to the proper application of § 5G1.2(d) remains correct and binding.

Magluta also makes the broader argument that he is entitled to resentencing under *Booker* because he was sentenced under a mandatory guidelines system. This *Booker* argument was raised for the first time in Magluta's reply brief. As we indicated in

our previous order granting in relevant part the government's motion to strike the portions of Magluta's reply brief raising this *Booker* argument, *United States v. Magluta,* No. 03-10694 (11th Cir. Nov. 17, 2004), an appellant may not raise an issue for the first time in a reply brief. *See United States v. Vanorden,* 414 F.3d 1321, 1322-23 (11th Cir. 2005) (per curiam); *United States v. Dockery,* 401 F.3d 1261, 1262-63 (11th Cir. 2005) (per curiam); *United States v. Ardley,* 242 F.3d 989, 990 (11th Cir. 2001) (per curiam). As a result, Magluta has abandoned this argument.

However, even if Magluta's *Booker* argument had not been abandoned because of his failure to raise it in his initial brief, he would still not be entitled to resentencing. Having failed to raise that issue in the district court, our review would be only for plain error. *Rodriguez,* 398 F.3d at 1298. As part of satisfying the plain error test, a defendant "must establish a reasonable probability that if the district court had considered the guidelines range it arrived at using extra-verdict enhancements as merely advisory, instead of mandatory, and had taken into account any otherwise unconsidered § 3553 factors, the court would have imposed a lesser sentence than it did." *Id.* at 1302. There is no evidence at all in the record to suggest that the district court would have imposed a lesser sentence than it did had it applied the guidelines in an advisory instead of mandatory manner. To the contrary, the court made it abundantly clear that

it would have given Magluta a life sentence regardless.

VII.

For the foregoing reasons, all of Magluta's convictions are AFFIRMED, except for the one for obstruction of justice through juror bribery, count 8, which is REVERSED. Magluta's sentence is VACATED, and the case is REMANDED.

If the government elects to dismiss count 8 instead of retry Magluta on that charge, or if a retrial on that count occurs and he is acquitted, the district court shall, at its discretion, either reimpose Magluta's sentence but with a reduction of 120 months as a result of there being no conviction for count 8, or the court may resentence Magluta on all the other counts for which he remains convicted. If the government elects to retry Magluta on count 8 and he is re-convicted of that charge, the district court shall then re-sentence him on all the counts.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16505

D.C. Docket No. 99-00583-CR-PAS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVADOR MAGLUTA, a.k.a. Sal,
AUGUSTO GUILLERMO FALCON, a.k.a. Willy,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2001)

Before TJOFLAT, CARNES and REAVLEY*, Circuit Judges.

PER CURIAM:

Augusto Falcon and Salvador Magluta appeal the district court's denial of their joint motion to dismiss

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* Honorable Thomas M. Reavley, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

on double jeopardy and collateral estoppel grounds parts of the pending indictment against them.

Insofar as the double jeopardy grounds are concerned, we affirm the district court's order for the reasons set out in the magistrate judge's report and recommendation, which was adopted by the district court.

As for the collateral estoppel grounds, our appellate jurisdiction is limited to the denial of the motion to dismiss, and it does not extend to any issues about whether evidence should be excluded on collateral estoppel grounds. *See United States v. Mock*, 604 F.2d 336 (5th Cir. 1979). The defendants contend that the basis of their acquittal on the charges contained in the 1991 indictment is that they stopped trafficking cocaine after their arrests in 1980. Even assuming that premise for purposes of the present discussion, it does not follow that collateral estoppel bars any part of the present prosecution. A finding that the defendants did not themselves engage in cocaine trafficking offenses after any particular date would not preclude a finding that they laundered the proceeds of controlled substances offenses, and conspired to do so, as charged in the present indictment. The defendants' arguments about the government's intended proof and whether certain evidence may be used to prove the elements of the present indictment go to evidentiary issues that we may not review in this interlocutory appeal. *See Mock*, 604 F.3d at 338-40. We imply no view on those issues which are the type that this Court can only decide in an appeal from a

final judgment. Nor do we imply any view on what we have only assumed for purposes of this present decision, which is the basis of the acquittal on the charges contained in the 1991 indictment.

AFFIRMED.

By: /s/ [illegible]
Deputy Clerk
Atlanta Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-583-CR-SEITZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUGUSTO GUILLERMO FALCON
and SALVADOR MAGLUTA, et al.,

Defendants /

ORDER DENYING MOTION TO DISMISS

(Filed Nov. 29, 2000)

This matter is before the Court on Defendants' Objections to the Magistrate Judge's Report and Recommendation that this Court deny the Defendants' Joint Motion to Dismiss. That motion seeks to dismiss the money laundering and forfeiture counts of the Fourth Superseding Indictment and to strike specified overt acts of money laundering in Count I on the grounds of double jeopardy and collateral estoppel. The Court has reviewed the Report and Recommendation, the Defendants' Objections, the Government's Response to those Objections, the Defendants' Reply and the papers and exhibits filed before Magistrate Judge Bandstra. Based upon this *de novo review*, the Court adopts and affirms the well reasoned analysis of Magistrate Judge Bandstra which found no merit in the Defendants' claim that

the double jeopardy clause of the Fifth Amendment bars the prosecution of the instant money laundering offenses.

The court now turns to the defendants' claim that the doctrine of collateral estoppel requires the dismissal of the money laundering offenses, the striking of the overt acts relating to such offenses in Count I, and precludes the introduction of evidence of narcotics trafficking or acquisition of proceeds from such trafficking after 1980. The Court agrees with Magistrate Judge Bandstra's analysis of the applicable law and the record in case 91-6060. In that case, the defense had three principal thrusts. One thrust was the lack of sufficient credible evidence to support each element of the charges in the indictment beyond a reasonable doubt. Another thrust was that the defendants had ceased any narcotics activity after 1980. This thrust was a hybrid of the first and third thrust. It was not so much an affirmative defense as it was a particularized expansion of the insufficiency of the evidence argument, but it laid the foundation for the third thrust. The third thrust was the five year statute of limitation defense that the defendants could not be found guilty of their narcotics importation or distribution activities occurred solely before April 10, 1986. Underlying these three thrusts, was the argument that government's conduct in the case was so egregious that a jury which cared about justice could not return a verdict of guilty.

After reviewing the exhibits filed in this record, the Court concurs that it is not clear which defense

provided the basis for the acquittal. Interestingly, the testimony of juror Braswell who testified in the trial of the jury foreman, although not dispositive, suggests that the jury considered a myriad of factors, rather than relying on one issue in deciding to acquit. Applying the *Brown* analysis, the Court finds that the Defendants have not established by clear and convincing evidence that the cessation of the Defendants' drug trafficking activities after 1980 was the sole rational basis for their acquittal. Therefore, the Defendants have not satisfied the first prong of the *Brown* test.

Even assuming the acquittal rested on the statute of limitations defense, which meant that the jury found the defendants did not traffic in cocaine after April 9, 1986, such finding would not preclude the finding that the defendants derived proceeds from their earlier trafficking activities much less that they used proceeds of anyone else's drug trafficking activities. The jury in Case No. 91-6060 was never asked to decide the issue of whether Defendant Falcon and Magluta laundered money derived from specified unlawful activity. To prove the elements of the money laundering charge, the government does not need to prove that the defendants own drug trafficking activities produced the proceeds used in the financial transactions. What the government must prove is that the proceeds used in the financial transactions were derived from narcotics trafficking and that the Defendants knew this was the source of the funds. Therefore, the Court concludes that for a jury to

return guilty verdicts on the money laundering counts in the Fourth Superseding Indictment would not be "rationally inconsistent" with the verdict of acquittal in Case No. 91-6060.

Defendants' Objections also seek to limit the introduction of evidence regarding the Defendants' prior narcotics trafficking activities. It is clear that the Defendants do not dispute narcotics trafficking activities prior to 1980. Thus the question is whether the acquittal in Case No. 91-6060 precludes the introduction of evidence of the defendants' participation in narcotics trafficking activities after 1980 because of the doctrine of collateral estoppel. The Government may offer evidence that relates to criminal conduct for which a defendant has been acquitted to support charges not decided by a prior acquittal when the evidence is relevant to an issue in the subsequent prosecution and is subject to a standard of proof lower than beyond a reasonable doubt. *United States v. Dowling*, 493 U.S. 342 (1990). To prove the money laundering charges contained in the Fourth Superseding Indictment, the Government must prove beyond a reasonable doubt that the Defendants conspired to conduct financial transactions knowingly using the proceeds of narcotics trafficking. Rule 404(b) evidence of other narcotics trafficking criminal conduct is subject to lower standard of proof than beyond a reasonable doubt. Such evidence would be relevant to establish the defendants' knowledge of the source of the proceeds used

in the charged financial transactions, thus it would be admissible under *Dowling*.

Finally, the Court concurs with Magistrate Judge Bandstra's finding that is unnecessary to reach the issue of the effect of the bribery conviction of the jury foreperson in Case No. 91-6060 on the double jeopardy or collateral estoppel claims raised in this case. Therefore it is

ORDERED that the Report and Recommendation of Magistrate Judge Ted Bandstra is affirmed and adopted by this Court, it is further

ORDERED that Defendants' Joint Motion to Dismiss on Double Jeopardy and Collateral Estoppel Grounds is DENIED.

DONE AND ORDERED in Miami, Florida this 29th day of November, 2000.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

Copies to The Honorable Ted E. Bandstra
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16473-bb

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVADOR MAGLUTA,
a.k.a. Sal,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Aug. 5, 2008)

Before: ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT
JUDGE

FILED
MAR 2 3 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-731

In the Supreme Court of the United States

SALVADOR MAGLUTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's convictions for money laundering were barred by collateral estoppel.

2. Whether the district court correctly sentenced petitioner in part on the basis of acquitted conduct.

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In the Supreme Court of the United States

No. 08-731

SALVADOR MAGLUTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is unreported. An earlier opinion of the court of appeals (Pet. App. 17a-51a) is reported at 418 F.3d 1166. Another earlier opinion of the court of appeals (Pet. App. 52a-54a) is unreported. The order of the district court (Pet. App. 55a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2008. A petition for rehearing was denied on August 5, 2008 (Pet. App. 60a-61a). On October 15, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 3, 2008, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to obstruct justice and disobey a court order (Count 1), in violation of 18 U.S.C. 371; conspiring to launder drug proceeds (Count 2), in violation of 18 U.S.C. 1956(h); obstructing justice through witness bribery (Count 6), in violation of 18 U.S.C. 1503; obstructing justice through juror bribery (Count 8), in violation of 18 U.S.C. 1503; and eight counts of money laundering (Counts 34-41), in violation of 18 U.S.C. 1956(a)(1)(B)(i). The district court sentenced him to 205 years of imprisonment, ordered him to forfeit $15 million and certain real property, and fined him $62,997,915. 03-10694 Gov't C.A. Br. 2. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 17a-51a. On remand, the district court sentenced petitioner to 195 years of imprisonment, reduced the fine by $250,000, and imposed the same forfeiture orders. 06-16473 Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner and his longtime friend Augusto Guillermo Falcon were two of South Florida's most prolific and notorious drug traffickers. Beginning in the late 1970s, petitioner embarked on a lengthy cocaine trafficking career that resulted in the distribution of tens of thousands of kilograms of cocaine. See 03-10694 Gov't C.A. Br. 3.

Petitioner and Falcon maintained their drug trafficking enterprise notwithstanding various run-ins with law

enforcement officers. In 1980, petitioner and Falcon pleaded guilty to Florida state drug charges. They remained free on bond pending appeal and continued to distribute cocaine. In 1985, they were arrested on California state drug charges, but they absconded to south Florida. See 03-10694 Gov't C.A. Br. 3.

After exhausting their appeals for their 1980 Florida convictions, petitioner and Falcon were ordered to surrender in August 1987 to begin serving their sentences. Neither surrendered, warrants were issued, and petitioner was arrested in 1988. Several days after his arrest, however, petitioner was erroneously released from jail and again became a fugitive. He later told Marilyn Bonachea, his longtime girlfriend, that someone had returned a favor by releasing him from jail. As a fugitive, petitioner rented luxury homes on Miami Beach, which he paid for with drug proceeds, and he continued to distribute cocaine. See 03-10694 Gov't C.A. Br. 3-4.

In April 1991, a federal grand jury returned a sealed narcotics and continuing criminal enterprise (CCE) indictment, No. 91-6060, against petitioner, Falcon, and eight associates. Shortly thereafter, the district court entered an order freezing approximately $2 billion in purported drug proceeds and requiring the defendants to obtain court approval before expending funds or dissipating assets, including those set aside for legal fees. See 03-10694 Gov't C.A. Br. 4.

Petitioner was captured in October 1991. A search of his home uncovered more than $200,000 in cash and several day-timer books that memorialized the distribution of 9367 kilograms of cocaine, worth approximately $149,520,000. See 03-10694 Gov't C.A. Br. 4.

While petitioner was a fugitive, and later an incarcerated defendant awaiting trial in No. 91-6060, Mark Dachs, an attorney and co-conspirator, discovered the identities of certain persons who were cooperating with the government. Petitioner enlisted the aid of Eduardo Lezcano, his wife's brother-in-law, to coordinate hit men from Colombia to murder persons who might testify against petitioner; the prospective victims included attorney Juan Acosta and six former drug associates. Acosta had set up offshore corporations for petitioner to use in laundering drug proceeds; Colombian hit men murdered him in 1988, shortly before he was to appear before a federal grand jury to produce documents related to petitioner's offshore interests. Hit men later murdered two of the six drug associates, and tried unsuccessfully to murder the other four. Petitioner told Bonachea that he had directed the three murders and one of the unsuccessful assassination attempts. See 03-10694 Gov't C.A. Br. 5-6.[1]

While in jail and awaiting trial in No. 91-6060, petitioner recruited associates to bribe and discourage potential witnesses from testifying against him; he also recruited fellow prisoners to testify on his behalf. For their loyalty, the prisoners or their families received large cash payments from drug proceeds. See 03-10694 Gov't C.A. Br. 7.

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[1] The jury in this case acquitted petitioner of the witness tampering through murder offenses charged in Counts 3-5, but convicted him of the obstruction conspiracy charged in Count 1, which incorporated the same allegations. Lezcano was convicted separately. See *United States* v. *Ramirez*, 324 F.3d 1225 (11th Cir.), cert. denied, 540 U.S. 881, and 540 U.S. 928 (2003); see generally 03-10694 Gov't C.A. Br. 6 n.1.

Oscar Mas was one of the inmates recruited and paid to testify against government witnesses in No. 91-6060. Through associates, petitioner paid Mas $87,000 to testify falsely against government witness Pedro Rosello. Mas ultimately refused to lie at trial, despite being pressured by Richard Martinez, a local attorney who was also petitioner's brother-in-law and co-defendant. Out of loyalty to petitioner and financial dependence on him, Bonachea falsely testified in No. 91-6060 by claiming that petitioner had stopped drug trafficking by 1980. See 03-10694 Gov't C.A. Br. 7-8.

Through associates, petitioner also laundered drug proceeds to circumvent the protective order in No. 91-6060 and to pay legal fees, reward associates, witnesses, and inmates, and maintain the organization's assets. The laundering methods included transporting cash to New York for deposit in overseas banks and subsequent transfer back to the United States by wire transfers and checks from nominee accounts; transferring cash to Latin American exchange houses for the issuance of foreign third-party checks; delivering cash payments through Bonachea and co-conspirator Jorge Hernandez; and delivering cash payments through Colombian couriers using false identification. While the protective order was in effect, petitioner paid approximately $19.5 million in laundered drug proceeds to attorneys and investigators representing members of his organization and other associates; he also paid several million dollars to inmates, associates, and family members. See 03-10694 Gov't C.A. Br. 8-9.

After their co-defendants pleaded guilty, petitioner and Falcon proceeded to trial in No. 91-6060. At the

start of the trial, petitioner told Bonachea that his longtime associate Jose Fernandez had recognized a female acquaintance on the jury panel and had, for more than $1 million, recruited her to vote for acquittals and to persuade other jurors to do the same. The jury's foreperson, Miguel Moya, a schoolmate of one of petitioner's lawyers and of petitioner's cousin, also accepted a bribe to perform the same functions. See 03-10694 Gov't C.A. Br. 9.[2]

The jury was sequestered during deliberations. Moya insisted on acquitting and refused to deliberate, saying that he could remain sequestered indefinitely. Pressured by Moya and fearing retribution from petitioner and Falcon, the jurors favoring conviction relented and in February 1996 acquitted petitioner and Falcon of all charges. The district court lifted the protective order in March 1996. See 03-10694 Gov't C.A. Br. 10.

Following the verdict, a juror who favored conviction but yielded to petitioner's tactics reported his suspicions

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[2] Moya was ultimately convicted of accepting a bribe, as well as conspiracy to commit that offense, obstruction of justice, money laundering and conspiracy to commit that offense, witness tampering and conspiracy to commit that offense, and making a false statement in a tax return. He was sentenced to 210 months of imprisonment. See Judgment at 3, *United States* v. *Moya*, No. 1:98-CR-00626-001 (S.D. Fla. Mar. 10, 2000) (Docket entry No. 403), aff'd, 252 F.3d 440 (11th Cir. 2001) (Table). Juror Gloria Alba pleaded guilty to obstruction of justice by accepting a bribe, and juror Maria Penalver pleaded guilty to conspiracy to commit that offense. Judgment at 1, *United States* v. *Alba*, No. 03-CR-20700-002 (S.D. Fla. Jan. 15, 2004) (Docket entry No. 101); Judgment at 1, *United States* v. *Penalver*, No. 03-CR-20700-004 (S.D. Fla. Jan. 15, 2004) (Docket entry No. 99). They were each sentenced to five years of imprisonment.

about Moya to the authorities. An investigation showed that Moya had extensive telephone contact with one of petitioner's associates during the trial. In the 27 months following the trial, Moya and his relatives, who were all persons of modest means, made more than $330,000 in cash expenditures and bank deposits. Following the verdict, petitioner expressed concern to Bonachea that Moya's spending of the bribe money might attract law enforcement attention. See 03-10694 Gov't C.A. Br. 10.

In 1996, after his acquittal in No. 91-6060, petitioner was indicted in the Southern District of Florida in another case on charges relating to the acquisition, possession, and sale of false identification documents. During the trial, he remained free on bond, but fled shortly before a verdict was returned. In April 1997, federal marshals arrested petitioner in Palm Beach. A search of petitioner's car yielded handwritten instructions to associates to assist him in remaining at large by accessing large amounts of cash, supplying cars, finding hiding places for false identification documents, tracking media reports, and locating property suitable for establishing a compound. See 03-10694 Gov't C.A. Br. 10-11.

Petitioner stored more than $50 million in drug proceeds to be used in funding his criminal enterprises with at least six associates. Approximately $15 million was hidden in garage floor safes on a property owned by Luis Valverde, a co-defendant and petitioner's long-time associate. In 1995, a fire erupted in the garage where the money was stored. Petitioner's associates salvaged the cash, dried it, and stored it in Valverde's home. A 1999 search of the home uncovered $6 million, some of

which had been fire- and water-damaged. See 03-10694 Gov't C.A. Br. 11-12.

At petitioner's direction, Bonachea maintained a ledger documenting $7.7 million that she had laundered for him while he was incarcerated. Following his release from jail in 1996, petitioner pressured Bonachea to give the ledger to him. In October 1996, officers stopped Bonachea while she was in transit to deliver the ledger to petitioner. Officers seized the ledger and other documents related to petitioner, including letters directing associates to hide and launder money for him. Petitioner then persuaded Bonachea to flee in order to prevent the authorities from compelling her to testify against him. Petitioner's associates delivered tens of thousands of dollars to Bonachea to keep her in hiding in upstate New York. See 03-10694 Gov't C.A. Br. 12-13.

Bonachea was arrested in April 1988. She agreed to cooperate, and, in September 1998, she met with co-defendant Jorge Hernandez while wearing a hidden recorder. During their second meeting, Bonachea expressed concern that the bribed female juror from No. 91-6060 might be exposed and endanger the organization. Hernandez assured Bonachea that the juror was "under control" and was not spending her bribe money ostentatiously. See 03-10694 Gov't C.A. Br. 13.

2. The 24-count indictment in No. 91-6060 had charged that, between January 1978 and April 1991, petitioner had engaged in a CCE, in violation of 21 U.S.C. 848; conspired to import cocaine, in violation of 21 U.S.C. 963; and conspired to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. That indictment had also charged petitioner with seven counts

of importing cocaine, in violation of 21 U.S.C. 952, and 14 counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a), and had alleged that those offenses occurred between mid-1986 and July 1989. 03-10694 Gov't C.A. Br. 16 & n.5.

The indictment in this case charged petitioner with conspiracy and other offenses involving obstruction of justice at his trial in No. 91-6060 through tampering with witnesses, bribing witnesses and jurors, and committing murder. See Fifth Superseding Indictment 1-31. In addition, the indictment charged petitioner with conspiring to launder drug proceeds, in violation of 18 U.S.C. 1956(h); and 32 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). The money laundering counts alleged that petitioner engaged in financial transactions involving the proceeds of drug trafficking. The money laundering conspiracy charged in Count 2 covered the period from January 1979 to December 2001, and the substantive money laundering offenses were alleged to have occurred between September 1994 and December 1998. See Fifth Supeseding Indictment 25-26, 31-38.

Petitioner moved to dismiss the money laundering charges on grounds of double jeopardy and collateral estoppel; he claimed that his acquittal on drug trafficking charges in No. 91-6060 established that he had not engaged in drug trafficking after 1980 and precluded the current money laundering charges. The government countered that petitioner's corruption of the jury in No. 91-6060 by bribing its foreperson barred his challenges to the money laundering charges. In the alternative, the government argued that because the jury in the earlier

case had returned a general verdict and petitioner had raised multiple defenses, it was impossible to determine the basis for the jury's verdict. The government also argued that proof of petitioner's personal involvement in drug trafficking was not an essential element of the money laundering charges. See 03-10694 Gov't C.A. Br. 17.

After a hearing, a magistrate judge recommended that petitioner's collateral estoppel claims be rejected because petitioner had not shown that the jury in No. 91-6060 had necessarily determined that petitioner had completely ceased his drug trafficking after 1980. See 03-10694 Gov't C.A. Br. 17-18.

The district court adopted the magistrate judge's recommendation. See Pet. App. 55a-59a. The court noted that petitioner's defense in No. 91-6060 had "three principal thrusts": (1) the charges were not supported by sufficient credible evidence; (2) petitioner had ceased any drug activity after 1980; and (3) if the drug distribution and importation activity occurred before April 10, 1986, the charges were barred by the five-year statute of limitations. *Id.* at 56a. Based on the record, the court agreed with the magistrate judge that it was "not clear which defense provided the basis for the acquittal." *Id.* at 56a-57a. Petitioner appealed, but the court of appeals refused to consider his evidentiary estoppel claims on interlocutory appeal. *Id.* at 52a-54a.

After a trial, the jury found petitioner guilty of conspiring to obstruct justice, as well some of the money laundering and obstruction charges. With respect to the money laundering charges, the jury found petitioner guilty on the conspiracy count (Count 2) and on eight

substantive counts involving financial transactions that occurred in October and December 1998 (Counts 34-41). See Verdict Form 2-3; Fifth Supeseding Indictment 36-37. The jury acquitted petitioner on the other 25 substantive counts (Counts 11-33, 42-43). Verdict Form 1-3. The jury also returned a special verdict finding that $15 million and certain real property were subject to forfeiture. Special Jury Verdict on Forfeiture 1.

At sentencing, the district court found that petitioner's Sentencing Guidelines range was life imprisonment, based on a total offense level of 43 and a criminal history category of V. Presentencing Report para. 274 (PSR). In calculating the offense level for the money laundering offenses, the court applied an 11-level enhancement under Sentencing Guidelines § 2S1.1(b)(2)(L) (1998) after finding that the value of the laundered funds exceeded $35 million. PSR para. 182. The court based that valuation on the laundered funds involved in the money laundering counts on which petitioner was acquitted as well as those counts on which he was convicted. The court rejected petitioner's argument that the special forfeiture verdict limited the valuation of the laundered funds to $15 million, which would have reduced his total offense level to 41. See 03-10694 Gov't C.A. Br. 57-59.

The district court imposed consecutive sentences totaling 205 years of imprisonment, to be followed by a three-year term of supervised release. See 03-10694 Gov't C.A. Br. 2. The district stated that, if its Guidelines calculations were erroneous, it would nonetheless upwardly depart from the guideline range under Guidelines § 5K2.0 to impose the same sentence because of

"the anomaly created by the obstruction in case 91-6060." 03-10694 Gov't C.A. Br. 63. The court stated that "the bribery of jurors, the bribery of witnesses, so goes to the heart of our criminal justice system * * * that the egregious nature of the offense here could only be recognized by an upward departure." Pet. App. 46a (internal quotation marks omitted).

3. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 17a-51a. The court affirmed petitioner's convictions on the money laundering counts. Without addressing the government's argument that petitioner's corruption of the jury in No. 91-6060 extinguished his collateral estoppel claim, see 03-10694 Gov't C.A. Br. 18-21, the court rejected petitioner's argument that collateral estoppel barred those convictions, see Pet. App. 19a-24a. The court acknowledged (*id.* at 20a-21a), that the government had introduced evidence of criminal activity for which petitioner had been acquitted in the earlier case in order to show that the money petitioner was accused of laundering was the proceeds of "specified unlawful activity," an essential element of the money laundering offense, see 18 U.S.C. 1956(a)(1)(B)(i). The court then noted that "[c]ollateral estoppel 'bars a subsequent prosecution only where a fact or issue necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial.'" Pet. App. 21a-22a (quoting *United States* v. *Brown*, 983 F.2d 201, 202 (11th Cir. 1993)). To apply the collateral estoppel doctrine, the court said, requires a two-step analysis: first, a court must determine whether "the jury's verdict of acquittal was based upon reasonable doubt about a sin-

gle element of the crime which the court can identify"; and, second, the court must determine "whether that element is also an essential element of the crime for which the defendant was convicted in the second trial." *Id.* at 22a (quoting *Brown*, 983 F.2d at 202).

The court of appeals assumed without deciding that petitioner was correct that the basis for his 1996 acquittal was his cessation of all drug trafficking activity in May 1980, and that the first step of the collateral estoppel test was thus satisfied. See Pet. App. 22a-23a. The court found, however, that petitioner had not satisfied the second step because he had not shown that the elements of the drug offenses of which he was acquitted in the earlier trial were essential elements of the money laundering offenses of which he was convicted in this case. *Id.* at 23a-24a. The court reasoned that petitioner's personal involvement in the criminal activity at issue in the earlier case was not an element of the money laundering offenses of which he was convicted in this case. *Ibid.* The government, the court said, had to prove that petitioner had, with the requisite knowledge and intent, conducted a financial transaction involving the proceeds of some felony drug offenses; it did not have to show that petitioner had committed those felony drug offenses. *Ibid.* The court observed that "[a]s far as the money laundering statute is concerned, laundering someone else's illegal proceeds is just as bad as laundering your own—there is no help-thy-neighbor exception to § 1956(a)(1)(B)(i)." *Id.* at 24a.[3]

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[3] The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence supporting his money laundering convictions. See Pet. App. 24a-30a.

The court of appeals reversed petitioner's conviction on Count 8 for obstruction of justice through bribery in No. 91-6060. The court concluded that the conviction rested, at least in part, on inadmissible hearsay statements admitting the acceptance of the bribe made by the bribed jury foreman, Miguel Moya, to an undercover FBI agent two and one-half years after the trial in No. 91-6060. Pet. App. 30a-36a. The court found that the error was not harmless. *Id.* at 36a-38a.

As a result of the reversal of that conviction, the court of appeals remanded for resentencing. The court rejected, however, petitioner's claims that the district court had otherwise erred at sentencing. Pet. App. 44a-51a. The court of appeals found it unnecessary to consider the merits of petitioner's contention that the district court had erred in enhancing his sentence based on its own determination that the amount of the money he laundered was at least $35 million. *Id.* at 44a-48a. The court held that, even if the district court had erred in not using the $15 million figure reflected in the jury's special forfeiture verdict, the error was harmless because the district court had stated its intention to depart upward to a life sentence in the event it was found to have incorrectly calculated the amount of laundered funds. *Id.* at 47a-48a.

The court of appeals noted that the district court had concluded that an upward departure was warranted because petitioner, "through his illegal conduct," had "escaped the punishment he deserved for the criminal conduct he was tried for in his 1996 trial." Pet. App. 46a. The court of appeals acknolwedged that it had overturned petitioner's conviction for obstructing justice by

bribing the earlier jury because that conviction had rested at least in part on inadmissible hearsay evidence of a bribed juror. But the court held that that reversal did not affect the validity of the district court's reliance on the bribery at sentencing, because it is "well-established that, in sentencing, a district court can consider hearsay * * * so long as there are sufficient indicia of reliability" and "[t]he tape-recorded statements of the juror to the undercover agent clearly have sufficient indicia of reliability." *Id.* at 47a n.8. The court of appeals also concluded that the district court had not abused its discretion in upwardly departing. See *id.* at 47a-48a.

The court of appeals ordered that the case be remanded, so that the government could decide whether to retry petitioner on the charge of obstructing justice by bribing jurors. Pet. App. 51a. The court noted that, if the government did not retry petitioner on that charge, or if petitioner was acquitted after a retrial, the district court could, at its discretion, "either reimpose [petitioner's] sentence but with a reduction of 120 months as a result of there being no conviction [on the reversed count], or * * * resentence [petitioner] on all the other counts for which he remain[ed] convicted." *Ibid.*

Petitioner filed a petition for a writ of certiorari, which this Court denied. 548 U.S. 903 (2006) (No. 05-952).

4. On remand, the government decided not to retry petitioner on the reversed count. At resentencing, the district court observed that "none of the facts ha[d] changed," and again determined that petitioner's advisory Guidelines range was life imprisonment, based on

a total offense level of 43 and a criminal history category of V. 11/29/06 Tr. 57; see *id.* at 17. Consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), the district court expressly considered the factors under 18 U.S.C. 3553(a) before imposing sentence, 11/29/06 Tr. 57-63, and it sentenced petitioner to a total term of 195 years of imprisonment, to be followed by a three-year term of supervised release. *Id.* at 62-64.

5. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioner's claim that the district court violated his Fifth and Sixth Amendment rights by enhancing his sentence based on acquitted, unproven, or uncharged conduct underlying the drug offenses charged in No. 91-6060, the obstruction of justice through jury bribery charged in the reversed Count 8, or its own determination that the value of the laundered funds exceeded $35 million. *Id.* at 2a n.1; see Pet. 31 n.13; 06-16473 Pet. C.A. Br. 55-58.[4]

ARGUMENT

1. Petitioner contends (Pet. 11-26) that the collateral estoppel doctrine of *Ashe* v. *Swenson*, 397 U.S. 436 (1970), mandates reversal of his money laundering convictions. That claim does not merit further review.

Under the collateral estoppel doctrine that is applied in criminal cases, a jury's acquittal of a defendant on one charge precludes the government from proceeding

[4] The court of appeals also rejected petitioner's claims that the district court incorrectly calculated the advisory Guidelines range, Pet. App. 5a-8a; that his 195-year sentence was procedurally and substantively unreasonable, *id.* at 8a-12a; and that the district court violated his Fifth Amendment privilege against self-incrimination, *id.* at 12a-16a.

against him later on a second charge only if the first jury necessarily found a fact in the defendant's favor that is essential to the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). If the prior "acquittal did not determine an ultimate issue in the [second] case," there is no bar. *Id.* at 348; cf. *Yates* v. *United States*, 354 U.S. 298, 338 (1957) ("The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding."). Facts that are merely of evidentiary significance in the second case, but that the jury need not find beyond a reasonable doubt in order to convict, may be proved to the second jury, even if the jury in the prior case found that the government had failed to establish them beyond a reasonable doubt. See *Dowling*, 493 U.S. at 348-349.

Under the money laundering statute, the government must show that the defendant, "knowing that the property involved * * * represents the proceeds of some form of unlawful activity," conducted a financial transaction "which in fact involve[d] the proceeds of specified unlawful activity," a term that includes drug trafficking. 18 U.S.C. 1956(a)(1). As petitioner acknowledges (Pet. 15), the government does not have to prove the particular drug transaction whose proceeds were laundered or the defendant's involvement in that transaction; it need only show that the funds were proceeds of some drug transaction. See, *e.g.*, *United States* v. *Phillips*, 219 F.3d 404, 415-416 (5th Cir. 2000); *United States* v. *Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996).

Petitioner contends (Pet. 14) that the "unlawful activity" whose proceeds were the subject of the money laundering counts in this case was, in fact, the same drug transactions that he claims the jury's 1996 acquittal establishes that he did not commit. Petitioner argues (Pet. 9-10, 13-17) that the court of appeals erred in basing its collateral estoppel analysis on what the government was theoretically required to prove on the money laundering counts, rather than asking whether the government in fact met its burden by proving facts already decided against it by the 1996 jury.

a. It is far from clear that the Eleventh Circuit has adopted the view, attributed to it by petitioner, that the government may "prove a crime using allegations a jury previously rejected, so long as it *hypothetically* could prove the charge with different evidence." Pet. 25. Petitioner focuses on a few sentences in the court's opinion that in his view suggest the "hypothetical facts" position. Pet. 14 (citing Pet. App. 23a-24a). The court of appeals, however, nowhere stated a rule that the application of collateral estoppel turns on hypothetical facts that the government in theory could have attempted to prove, rather than the actual facts presented to the jury. To the contrary, the court stated that petitioner's collateral estoppel claim "fail[ed] because [petitioner's] personal involvement in, or guilt of, the criminal activity charged in the earlier case [was] not an element of the money laundering charge he was convicted of in this case." Pet. App. 23a. In other words, the court may have viewed this case as one in which the prior acquittal did not "determine an ultimate issue in the present case," *Dowling*, 493 U.S. at 348, but instead was relevant to what was a

mere evidentiary fact in the present case—*i.e.*, *who* was involved in the prior drug activity. Under that view, the court's ruling would not rest, as petitioner contends (Pet. 14, 19), on wholly theoretical speculation that petitioner could have laundered the proceeds of someone else's unlawful activity.

In addition, the court of appeals' decision in this case quoted and cited two of its prior decisions—both written by Judge Carnes, who wrote the opinion for the court in this case as well—for the proposition that, for collateral estoppel to apply, "[t]here * * * has to be such *factual* identity of the issues that [t]he subsequent verdict of conviction [is] rationally inconsistent with the prior verdict of acquittal." Pet. App. 22a (internal quotation marks omitted; emphasis added) (citing *United States* v. *Brown*, 983 F.2d 201, 202 (11th Cir. 1993), and *United States* v. *Garcia*, 78 F.3d 1517, 1521 (11th Cir. 1996)). In *Brown* and *Garcia*, the Eleventh Circuit made clear that application of the collateral estoppel doctrine depends on whether the *actual* facts that the jury must find in order to convict the defendant at the second trial were found adversely to the government at the first trial. As the court explained in *Brown*, "identity of overlapping elements required for collateral estoppel must extend *beyond* the legal definition of the elements" and "[t]here must also be a *factual* identity of issues to such an extent that a jury rationally could not have a reasonable doubt about * * * [the element] involved in the first trial without also having a reasonable doubt about * * * [the element] involved in the second trial." 983 F.2d at 204 (emphases added); see *ibid.* ("The subsequent verdict of conviction must be rationally inconsis-

tent with the prior verdict of acquittal."). The court in *Brown* ultimately concluded that collateral estoppel did not apply after conducting a detailed analysis of the actual facts that the government proved to support the conviction in the second case, see *id.* at 204-205,[5] while the court in *Garcia* reached the contrary conclusion, see *Garcia*, 78 F.3d at 1521-1522.[6] Both cases, however, demonstrate that the law in the Eleventh Circuit is that a court applying the collateral estoppel doctrine must look beyond the abstract definitions of the elements to

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[5] The court in *Brown* examined the basis for conviction at the second trial, 983 F.2d at 204-205, before concluding that collateral estoppel did not apply because "there were differences between the two financing schemes" such that the earlier acquittal did not preclude conviction in the second trial, *id.* at 205. See *id.* at 204 (noting that in *Ashe*, collateral estoppel applied "not merely because identity was the only element at issue" in both the first and second trials, but also "because the six hapless poker players were robbed by the same robbers at the same time, and there was no rational way to reconcile the second jury's finding that there was no reasonable doubt [the defendant] was one of the robbers with the first jury's finding that there was a reasonable doubt whether he was").

[6] The defendant in *Garcia* was convicted of traveling in interstate commerce with intent to facilitate importation of cocaine following his earlier acquittal on conspiracy and substantive cocaine charges. The court found that the acquittal on a motion under Federal Rule of Criminal Procedure 29 established "that [the defendant] was not knowingly involved in the charged [cocaine] conspiracy at any time during the specified period," 78 F.3d at 1521, while the later conviction, as the case was presented to the jury, rested on proof that he was. See *id.* at 1522 ("To accept the government's attempted reconciliation of the results of the two trials, we would have to believe it logical for [the defendant] to have travelled with the intent to promote the conspiracy, and then a few days later to have had no knowledge of that same conspiracy.").

be proved and consider the actual facts that, if found by the jury, would preclude a conviction.

The court of appeals in this case relied on—and certainly did not purport to disagree with—*Brown* and *Garcia*. And any tensions within the Eleventh Circuit's decisions in this area would not warrant further review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. In any event, this case would not be a suitable vehicle for considering petitioner's collateral estoppel claim because that claim also fails for two other, and independent, reasons.

First, petitioner's collateral estoppel claim rests on the premise that "the basis of his 1996 acquittal was that he had ceased all drug trafficking activities in May 1980," on the theory that this "was the only defense he put forward to the crimes alleged in his 1996 trial." Pet. App. 22a-23a. As the district court explained, however, petitioner's acquittal on the 1996 charges could have rested on an alternative, statute-of-limitations defense, under which petitioner could not have been found guilty if his "narcotics importation or distribution activities occurred solely before April 10, 1986." *Id.* at 56a. Thus, "assuming the acquittal rested on the statute of limitations defense, * * * such finding would not preclude the finding that [petitioner] derived proceeds from [his] earlier trafficking activities" and that he engaged in the post-1986 money laundering transactions charged in this case using the proceeds of pre-1986 drug transactions. *Id.* at 57a.[7]

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[7] Petitioner himself argued in the 1996 prosecution that his considerable, unexplained wealth was the result of drug trafficking in the early

The district court determined that "it [was] not clear which defense provided the basis for the acquittal." Pet. App. 56a-57a. Accordingly, the district court found that petitioner had not established the predicate for his collateral estoppel claim: "that the cessation of [petitioner's] drug trafficking activities after 1980 was the sole rational basis for [his] acquittal" in 1996. *Id.* at 57a.[8] That ruling was correct, and the court of appeals did not disagree with it, but simply "assume[d] without deciding" that petitioner's prior acquittal did establish that he had ceased drug trafficking after 1980. *Id.* at 23a.

Second, the 1996 verdict should not be given collateral estoppel effect in any event, because it was the result of a process that has been determined to have been corrupted. The collateral estoppel doctrine rests on a determination of what "a rational jury" found. *Ashe*, 397 U.S. at 444; see *United States* v. *Powell*, 469 U.S. 57, 68

1980's and that the jury need not concern itself with his financial transactions. 03-10694 Gov't C.A. Br. 24. Accordingly, the convictions for money laundering in this case are consistent with petitioner's own defense in the 1996 prosecution.

[8] The court also discussed a third possible basis for the 1996 acquittal, under which there was a "lack of sufficient credible evidence to support each element of the charges in the indictment beyond a reasonable doubt." Pet. App. 56a. Insofar as the jury acquitted petitioner of the substantive counts in the 1991 indictment, all of which involved post-1986 activity, based on that defense, the acquittal would establish only that the government had not proved petitioner's involvement in those particular drug transactions. Such an acquittal would not bar the instant money laundering counts, because the government did not have—and did not in fact—tie the money laundering counts in this case to any particular drug transactions. Accordingly, that ground for acquittal too would not have a collateral estoppel effect on the money laundering counts on which petitioner was convicted in this case.

(1984) (collateral estoppel rests on "the assumption that the jury acted rationally"). Here, petitioner was convicted of conspiring to obstruct justice and obstructing justice through juror bribery in the 1996 case, which including paying the jury foreperson at least $300,000. See Pet. App. 30a n.4. Although the court of appeals reversed that conviction on the ground that the hearsay statements of the bribed foreperson were mistakenly admitted in evidence, the trial court independently found that petitioner had in fact bribed the jury foreperson when it adopted the relevant portions of the presentence report. See PSR paras. 103-109; 1/16/03 Tr. 378;[9] see also Pet. App. 46a-47a & n.8 (noting district court properly relied on petitioner's bribery of prior jury to support upward departure). Moreover, the foreperson and two other jurors were themselves convicted in separate cases of obstruction, conspiracy, and bribery offenses in connection with the 1996 trial. See note 2, *supra*. Accordingly, even taking into account the reversal of petitioner's conviction of obstruction of justice through bribery of the 1996 jury, it has been established that petitioner corrupted the jury in the 1996 case, and it has been proved beyond a reasonable doubt that, regardless of who did it, that jury was in fact corrupted.

In these circumstances, where there is clear evidence that the process by which the jury reached its verdict was tainted, the verdict in the 1996 case should not be given collateral estoppel effect. In *Aleman* v. *Honorable*

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[9] The district court found that the allegations that petitioner bribed the foreperson were "amply supported by the record beyond a reasonable doubt," before noting that "[f]or the purposes of this, I need simply to say by a preponderance of the evidence." 1/16/03 Tr. 378.

Judges of the Circuit Court, 138 F.3d 302, 308 (7th Cir.), cert. denied, 525 U.S. 868 (1998), the defendant bribed a judge at his first murder trial and then claimed that double jeopardy principles barred a second prosecution on the same charge. The state court ruled that, where a defendant has bribed a judge in a prior case, he was never truly in jeopardy in that proceeding such that he can assert an acquittal in that case as a bar to further prosecution. On the defendant's habeas petition, the Seventh Circuit affirmed that ruling as not "contrary to, or an unreasonable application" of this Court's precedent. *Ibid.* As the court explained, "[t]o allow [the defendant] to profit from his bribery and escape all punishment for the * * * murder would be a perversion of justice, as well as establish an unseemly and dangerous incentive for criminal defendants." *Id.* at 309. The same principle applies with even greater force here, given that the collateral estoppel doctrine "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980), and no such confidence can attach to a verdict secured by bribery.

c. The question presented by petitioner also does not warrant further review because the collateral estoppel principle on which he relies rarely arises and is even more rarely litigated in federal court. Petitioner cites (Pet. 19-23) seven decisions of five courts of appeals that in his view conflict with the court of appeals' decision in this case and establish that collateral estoppel applies to ultimate facts actually litigated in the second trial. The oldest of those decisions date from 1979, and all date

from 1997 or earlier. Similarly, of the six decisions of state courts of last resort cited by petitioner (Pet. 23-26), all but one date from the period from 1978 to 1992. Petitioner has failed to show that the question he presents arises with any frequency, as revealed by the age of all but one of the cases he cites. Further review of petitioner's collateral estoppel claim is therefore unwarranted for that reason as well.[10]

2. Petitioner contends (Pet. 26-34) that the district court erred in relying in part on conduct for which he was acquitted in No. 91-6060 in imposing sentence in this case. Specifically, petitioner asserts that consideration of acquitted conduct at sentencing "violates (1) the Fifth and Sixth Amendments in general; (2) the Fifth and Sixth Amendments at least when the sentence would be substantively unreasonable but for the truth of the acquitted conduct; or (3) the requirement in *United States* v. *Booker*, 543 U.S. 220 (2005), that sentences be 'reasonable.'" Pet. 26. Those contentions do not warant further review.

a. The district court did not err in considering acquitted conduct in imposing sentence. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent

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[10] Petitioner suggests (Pet. 24 & n.10) that this case should be held if the Court grants certiorari in *Ohio* v. *Wade*, No. 08-585. The Court denied certiorari in *Wade* on January 12, 2009. See 129 S. Ct. 921.

There is likewise no need to hold this petition for a writ of certiorari pending *Yeager* v. *United States*, cert. granted, No. 08-67 (Nov. 14, 2008) (to be argued Mar. 23, 2009), which involves the very different issue of whether a jury's verdict of acquittal on some counts may collaterally estop the government from retrying the defendant on other counts on which the jury was unable to reach a verdict at the same trial.

the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157.[11] The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.* Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *id.* at 157. That principle pre-dated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines regime put into place by *Booker*.

This Court's decisions in *Booker* and subsequent cases confirm that there is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty. As the Court explained in *Booker*:

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[11] Petitioner's alternate assertion (Pet. 28) that a sentencing court may not "consider[] alleged conduct the jury refused to find" unless such conduct is "proved * * * beyond a reasonable doubt" is thus squarely inconsistent with *Watts*, and petitioner does not cite any court of appeals decison adopting such a view.

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

543 U.S. at 233 (citations omitted). This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And, in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 2465-2466; see *id.* at 2467 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discre-

tion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251. As the Court recognized in *Watts*, such consideration is not unfair to a defendant because "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other the one of which the defendant was convicted." 519 U.S. at 155 (quoting *Witte* v. *United States*, 515 U.S. 389, 401 (1995)). The rationale of *Watts*—that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be considered at sentencing without satisfying that standard of proof—remains fully valid after *Booker*.

Consistent with those principles, the district court was allowed to find, in calculating petitioner's offense level under Guidelines § 2S1.1(b)(2)(L) (1998), that the value of the laundered funds exceeded $35 million. PSR para. 182. The district court was also allowed to consider, in applying the factors in 18 U.S.C. 3553(a), petitioner's long history of involvement in drug trafficking and his role in bribing jurors in No. 91-6060. 11/29/06 Tr. 60 (finding bribery of jury was "the most egregious evidence of obstruction of justice" in court's experience); *id.* at 61 (noting petitioner's drug-trafficking history "goes back to the '70s").[12]

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[12] Petitioner lumps together the "unproven facts" in his challenge to his sentence. See Pet. 31 n.13. As discussed above, however, the only "unproven fact[]" relied upon by the district court in the calculation of the Guidelines range was the valuation of the laundered funds. The dis-

Petitioner's alternate contention (Pet. 34) that his sentence violates the remedial portion of *Booker* that requires a sentence to be "reasonable" under the standard set forth in 18 U.S.C. 3553(a) is likewise without merit. Contrary to petitioner's contention (Pet. 34) that Congress's use of the word "offense" at various points in Section 3553(a) restricts the district court's consideration to "the offense *of conviction*," the Court's remedial opinion in *Booker* makes clear that sentencing courts may continue, consistent with prior practice, to look to a defendant's "real conduct" when imposing sentence. 543 U.S. at 223 (discussing 18 U.S.C. 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant that a sentencing court "may receive and consider for the purpose of imposing an appropriate sentence").

b. Further review of petitioner's acquitted conduct claim would be particularly unwarranted because, as petitioner acknowledges (Pet. 31-32), there is no conflict among the courts of appeals on this issue.[13] Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing.[14] This Court recently denied a

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trict court considered the other two "unproven facts" only as reasons not to vary below the Guidelines range of life imprisonment.

[13] Petitioner's reliance (Pet. 26-30) on various district court decisions and separate concurring and dissenting opinions in the courts of appeals does not warrant further review.

[14] See *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 128 S. Ct. 2460 (2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409,

petition for a writ of certiorari raising that issue, see *Toepfer* v. *United States*, 129 S. Ct. 1000 (2009) (No. 08-469), just as it has repeatedly denied other similar petitions for writs of certiorari,[15] including those denied after the Court's decisions in *Rita*, *supra*, and *Gall* v. *United States*, 128 S. Ct. 586 (2007).[16] The Court has likewise denied numerous petitions for writs of certiorari that raised claims similar to petitioner's alternate claim (see Pet. 33-34) that his Sixth Amendment rights were violated because his sentence would be unreasonable

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409-411 (4th Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

[15] See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, 549 U.S. 819 (2006) (No. 05-1548); *Lynch* v. *United States*, 549 U.S. 836 (2006) (No. 05-10945).

[16] See, *e.g.*, *Morris* v. *United States*, 128 S. Ct. 2502 (2008) (No. 07-1094); *Douglas* v. *United States*, 128 S. Ct. 1875 (2008) (No. 07-8765); *Hurn* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-605); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008) (No. 07-5810); *Smith* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7432); *Wemmering* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7739); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008) (No. 07-8076); *Freeman* v. *United States*, 128 S. Ct. 1750 (2008) (No. 07-9368).

absent the district court's reliance on the acquitted, unproven and uncharged conduct.[17] There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

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[17] See, *e.g.*, *Marlowe* v. *United States*, 129 S. Ct. 450 (2008) (No. 07-1390); *Bradford* v. *United States*, 128 S. Ct. 1446 (2008) (No. 07-7829); *Alexander* v. *United States*, 128 S. Ct. 1218 (2008) (No. 07-6606).

In addition, petitioner did not raise an "as-applied" Sixth Amendment claim until his reply brief in the court of appeals in his current appeal. See 06-16473 Pet. C.A. Br. 47-58; 06-16473 Pet. C.A. Rep. Br. 23-24. The Eleventh Circuit has a well-settled rule that a defendant may not raise an issue for the first time in a reply brief, see, *e.g.*, *United States* v. *Britt*, 437 F.3d 1103, 1104 (2006), and, consistent with that practice, the court of appeals did not address petitioner's as-applied Sixth Amendment claim. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

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IN THE
Supreme Court of the United States

SALVADOR MAGLUTA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Fort Lauderdale,
FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
1201 Third Street
Suite 2200
Seattle, WA 98101
(206) 622-3150

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

The government seems to believe that Petitioner was a "prolific and notorious drug trafficker[]," and that he was even involved in various clandestine murders and malfeasance. BIO 1, 4. The problem with these incendiary allegations is that the government has never proven them to a jury in a court of law. Nonetheless, the government has persisted in the face of acquittal after acquittal to seek to use a handful of relatively minor money laundering convictions to punish Petitioner for all of these purported acts.

The Eleventh Circuit's decision condoning such a prosecution and sentence shows that it is time for this Court to straighten out the law concerning the effect of acquittals. Criminal prosecutions should stand or fall on the facts that prosecutors prove (or fail to prove) to juries, not on prosecutors' after-the-fact attempts to conjure hypothetical scenarios or to tar defendants with unproven allegations. The government's use of acquitted conduct has tainted Petitioner's convictions and sentence, and this Court should not allow them to stand.

I. This Court Should Confirm That Collateral Estoppel Requires Analysis Of The *Actual* Evidence Adduced At A Trial Following A Prior Acquittal.

The government makes no attempt to defend the Eleventh Circuit's holding that a purely hypothetical explanation for a guilty verdict at a second trial can avoid the collateral estoppel effect of a prior acquittal. If anything, the government's brief implicitly agrees

with Petitioner that such a rule transgresses *Ashe v. Swenson*, 397 U.S. 436 (1970), and conflicts with the decisions of other Courts of Appeals and the high courts of several states, *see* Pet. for Cert. at 13-24.

The government nevertheless urges this Court to deny review for three reasons: (1) the Eleventh Circuit's holding permitting the government to avoid the preclusive effect of Petitioner's prior acquittal by positing facts completely unsupported by the record does not *really* represent the law in the Eleventh Circuit; (2) there are two alternative grounds on which the Eleventh Circuit could have rejected Petitioner's collateral estoppel argument; and (3) the issue does not arise with sufficient regularity. None of these arguments supplies a valid reason for declining to reverse the Eleventh Circuit, at least by means of a limited grant-vacate-and-remand or summary reversal.

1. The Eleventh Circuit's holding is readily apparent. The court explained in no uncertain terms that in order for the government to be collaterally estopped from pursuing a subsequent prosecution, the defendant must:

> establish that the elements of the crime on which the prior acquittal was based are also essential elements of the crime for which he was convicted at the second trial. *See* [*United States v. Garcia*, 78 F.3d 1517, 1521 (11th Cir. 1996); *United States v. Brown*, 983 F.3d 201, 202 (11th Cir. 1993)]. That is to say, [Petitioner] must show that the elements of the drug offenses which led to

> his acquittal in the 1996 trial are essential elements of the money laundering offenses for which he was convicted in this case.

Pet. App. 23a. It is undisputed that the government never introduced any evidence of narcotics activity that had not already been resolved in Petitioner's favor by the jury in the 1996 trial. Thus, in the Eleventh Circuit, so long as the government *could have* proved its case using non-acquitted conduct—irrespective of whether it actually did—collateral estoppel is inapplicable. All that matters in this respect is a hypothetical comparison of the elements of the crimes in the two prosecutions.

The government's protestation that the Eleventh Circuit's decisions in *Garcia* and *Brown* require courts, in addition to comparing the elements of prior and present charges, to "look beyond the abstract definitions of the elements to be proved and consider the actual facts" established at the second trial (BIO 20-21) is thus irrelevant. The point here is that the decision below, just like *Garcia* and *Brown*, holds that it is not enough for a defendant to satisfy that "actual facts" test. In the Eleventh Circuit, unlike almost every other court to address the issue, a defendant who satisfies the "actual facts" test must "'*also*'" show that the government could not have proven the elements of the charge at the second trial even with a hypothetical set of different facts. Pet. App. 22a (quoting *Garcia*, 78 F.3d at 1521) (quoting in turn *Brown*, 983 F.2d at 202) (emphasis added). The petition for certiorari asks this Court to address the propriety of this extra requirement that the Eleventh

Circuit imposes on defendants, and the government offers no defense for that requirement.[1]

2. Neither of the government's alternate arguments for sustaining the Eleventh Circuit's decision justifies foregoing review of it. For starters, it is disingenuous for the government now to rely exclusively on alternative grounds for rejecting Petitioner's collateral estoppel argument when the government encouraged the Eleventh Circuit to rebuff the argument the way it did. In its brief in that court, the government asserted that it did *not* need to rely on the drug trafficking for which Petitioner was acquitted in 1996 to prove beyond a reasonable doubt the "specified unlawful activity" element of the money laundering charges. 03-10694 Gov't C.A. Br. 26. Because the government did not argue that it *actually* relied on any different evidence at the second trial, the only possible interpretation of the government's argument was to understand it to be contending that its *hypothetical* ability to prove the subsequent charges with different evidence was enough to avoid collateral estoppel.

Having lured the Eleventh Circuit into the holding it issued, this Court should not allow the government now to turn its back on that holding. At a bare minimum, Petitioner respectfully suggests that the

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[1] The government also suggests that the Eleventh Circuit "may have viewed this case as one in which the prior acquittal did not determine an ultimate issue in the present case." BIO 18 (internal quotation marks and citation omitted). But such a holding would have been nonsensical, which the government apparently recognizes because it declines to defend the idea. It was necessary—an ultimate issue—in this prosecution for the government to prove that Petitioner laundered money derived from drug dealing. Pet. for Cert. 2; Pet. App. 21a n.2.

Court exercise its authority under 28 U.S.C. § 2106 to grant the writ of certiorari, reverse the Eleventh Circuit's judgment, and remand for further proceedings. The situation here is similar to one in which the Solicitor General acknowledges that there might have been error in the reasoning below, but argues that the outcome is nevertheless correct for other reasons. In such instances, this Court has granted, vacated, and remanded cases to permit the court of appeals, "in the first instance [to] pass on the adequacy of [those] reasons." *Alvarado v. United States*, 497 U.S. 543, 544-45 (1990) (per curiam); *see also id.* (stating that it is not "novel" to GVR "where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed"); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991) (same).[2] Because the government implicitly concedes that the Eleventh Circuit's ruling can be justified only on alternative grounds that the court of appeals did not consider, this Court should require the government to try to establish one of those grounds, in the first instance, to the satisfaction of the Eleventh Circuit.[3]

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[2] Such procedure is all the more warranted in a criminal proceeding. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) (granting GVR and noting that "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated").

[3] At a minimum, this Court should hold this case pending its decisions in *Yeager v. United States*, No. 08-67, and *Bobby v. Bies*, No. 08-598, in which this Court will be considering the

In any event, neither of the government's alternative explanations for how the Eleventh Circuit nevertheless reached the correct result withstands scrutiny.

First, the government argues that collateral estoppel is inapplicable because Petitioner fails the first prong of *Ashe*—in other words, it is impossible to ascertain whether the jury in the 1996 trial acquitted Petitioner because he stopped trafficking narcotics by 1980. BIO 21-22. This contention is of no moment here, however, because the Eleventh Circuit "assum[ed]" that the first jury did in fact make such a determination. Pet. App. 23a.

Moreover, the government's characterization of what the jury necessarily decided at the first trial is mistaken. Petitioner presented a single unitary defense at the 1996 trial that he stopped all illicit activities in 1980 after an alleged co-conspirator went to jail and Petitioner himself was sentenced in a state narcotics case. And the only evidence that Petitioner offered showing that he withdrew from the conspiracy related to 1980. The alternative defenses posited by government, including a statute-of-limitation defense predicated on certain kinds of activities before April 10, 1986 falling outside of the limitations period, BIO 21-22 & n.8, were wholly subsumed subparts of that single defense. Because the jury acquitted Petitioner on *all* counts, it must have decided that Petitioner ceased drug trafficking in 1980, not sometime in between 1980 and 1986, and that he never resumed such trafficking. The government's suggestion to the contrary ignores that the statute of limitations defense

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meaning and scope of *Ashe v. Swenson*'s collateral estoppel rule in great depth.

would have applied only to *some* of the charged counts, not to the substantive importation and distribution offense which dated from mid-1986 onward (*see* BIO 22 n.8; Pet. App. 20a) *within* the statute of limitations period.

Second, the government argues that the 1996 acquittal is not entitled to collateral estoppel effect because it was allegedly the product of obstruction of justice. BIO 22-24. In essence, the government asserts that before giving an earlier acquittal preclusive effect, a court should look behind the jury's acquittal and attempt to discern the reasons the jury reached the decision it did. This argument founders on the facts and the law.

As a matter of fact, the government's citations to the district court's findings lack force because the Eleventh Circuit *overturned* Petitioner's conviction of obstruction of justice through jury bribery, Pet. App. 37a-38a, and the government declined to pursue that charge on remand, BIO 15. It also bears mention that the judge in the 1996 trial—against whom the government has leveled *no* allegations of tampering—granted judgments of acquittal on seven of the charges brought by the government before the case even went to the allegedly tainted jury. Pet. App. 19a.

As a matter of law, courts may not look behind jury acquittals in any event. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978); *see also United States v.*

Scott, 437 U.S. 82, 91 (1978) (courts may not disregard an acquittal, "however mistaken the acquittal may have been"). If, as here, the government believes that a defendant obtained an acquittal through obstructing justice or other illegal means, the government may prosecute the defendant for *that* wrongdoing and, if it obtains a conviction, severely punish him. But the government may not allege malfeasance in the first trial as an end-run around double jeopardy's application to the original charges.

The Seventh Circuit's decision in *Aleman v. Honorable Judges of the Circuit Court*, 138 F.3d 302, 304 (7th Cir. 1998), is not to the contrary. The court of appeals there acknowledged that it may well be impermissible to look behind jury verdicts for the purpose of turning back double jeopardy challenges. *Id.* at 308. The court of appeals held simply that "the highly deferential standard of collateral review leads us to hold that the contrary interpretation—the one adopted by the Illinois courts in this case—is also not unreasonable." *Id.* No court has extended *Aleman* to a case on direct review.

3. The collateral estoppel issue is more than pressing enough to warrant this Court's attention. The constitutional principle embodied by the collateral estoppel doctrine—that the government cannot force defendants down the gauntlet a second time—is "extremely important." *Ashe*, 397 U.S. at 443. And the doctrine comes into play with great frequency; a cursory search on Westlaw reveals that *Ashe* and its progeny have been cited in thousands of reported decisions. To the extent that there recent decisions involving the specific question at issue here are sparse,

the most likely reason is nearly every court has long forbidden what the Eleventh Circuit condoned here. And if government only rarely (and perhaps out of desperation) resorts to a strategy of pursuing subsequent prosecutions based on purely hypothetical explanations for prior acquittals, that makes the practice *more* suspect, not less, and thus *more* in need of review.

This Court should correct the Eleventh Circuit's erroneous rule before it does further mischief. It requires little reflection to appreciate that the government often would like to avoid the effects of prior acquittals—especially when, as here, it is dealing with an individual it is convinced has committed numerous crimes and deserves punishment. This Court should not let the disagreement concerning the import of *Ashe* compound any further.

II. The Continued Vitality of *United States v. Watts* Merits This Court's Review.

The government contends that this Court should forego reviewing the permissibility of sentencing a defendant based on alleged conduct for which the government tried and failed to obtain a valid jury verdict because (1) there is no circuit conflict on the issue; and (2) such sentencing is permissible in any event. Neither of these arguments is convincing.

1. The absence of a circuit split does not diminish the need for review here. When this Court issues a decision that calls a prior precedent into grave doubt, it is customary for appellate courts to abide by the prior precedent until this Court expressly abrogates or overrules it. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203,

238 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quotation marks omitted). The government acknowledges that this is the situation here, BIO 25-26, 28 for this Court held in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), that sentencing courts could rely on acquitted conduct and *Booker* did not squarely address this issue. So the only issue is whether the continuing vitality of *Watts* is sufficiently important to warrant review. The government does not dispute that it is.

The Sixth Circuit's recent en banc decision in *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), *pet'n for cert. pending* (No. 08-9523), underscores the importance of addressing this issue once and for all. Diving nine-to-six, the en banc court of appeals agreed with an earlier D.C. Circuit opinion "that defendants understandably perceive unfairness when sentencing courts rely on acquitted conduct." *Id.* at 386 (citing *United States v. Settles,* 530 F.3d 920, 923-24 (D.C. Cir. 2008)). But the majority held that it was powerless to do anything about this because it considered *Watts* to be "binding precedent," and it felt that "*Booker* did not alter the *Watts* position on acquitted conduct." *White,* 550 F.3d at 383, 386 (quotation and citation omitted).

2. The Eleventh Circuit's decision is incorrect. The driving force behind *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), is that a jury must be permitted to act as a

"circuitbreaker" in the machinery of justice by refusing to permit increased punishment based on the facts that the government presents to it. *Blakely*, 542 U.S. at 306-07; *see also Booker*, 543 U.S. at 237 (jury must "stand between the individual and the power of the government"). Using acquitted conduct to increase a defendant's punishment – here, by almost ten times what would be permissible based on the jury verdict alone, *see* Pet. for Cert. 2 – is fundamentally inconsistent with that principle.

Even if the government were correct that this principle can give way in the post-*Booker* sentencing world when jury verdicts apply the beyond-a-reasonable-doubt standard (*see* BIO 28) and judges employ merely a preponderance test, that would not salvage the district court's decision here to sentence Petitioner based on a $35 million money laundering conspiracy, for the jury found *by a preponderance of the evidence* that only $15 million was involved. *See* Pet. for Cert. at 6. Nor would it salvage the as-applied Sixth Amendment problem here with relying on acquitted conduct as the only means of rendering a sentence substantively reasonable under the post-*Booker* Sentencing Reform Act. Pet. for Cert. 33-34. The government, in fact, does not even contend that Petitioner's sentence is reasonable apart from the district court's reliance on acquitted conduct.

Even setting aside the Sixth Amendment, the government is incorrect that a sentence is reasonable under *Booker*'s remedial opinion when it relies on acquitted conduct, so long as the court deems the conduct to be "relevant conduct." BIO 29. The concept of "relevant conduct" was born in the Federal

Sentencing Guidelines, not the Sentencing Reform Act. And *Booker*'s remedial opinion measures reasonableness against the factors listed in 18 U.S.C. § 3553(a), which focus on the "the seriousness of the offense," *id.* § 3553(a)(1), not of other allegations for which the jury acquitted the defendant.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Fort Lauderdale,
FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
1201 Third Street
Suite 2200
Seattle, WA 98101
(206) 622-3150

April 2009

Counsel for Petitioner